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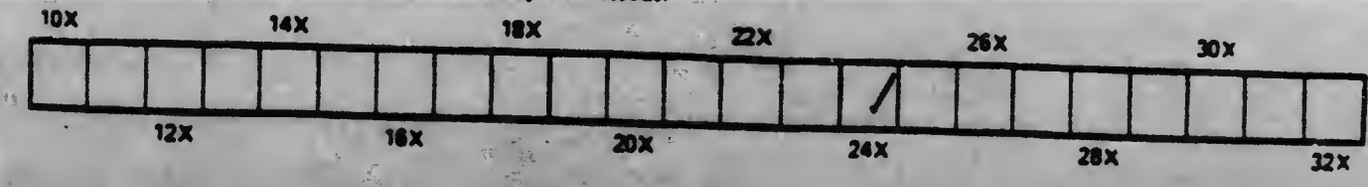

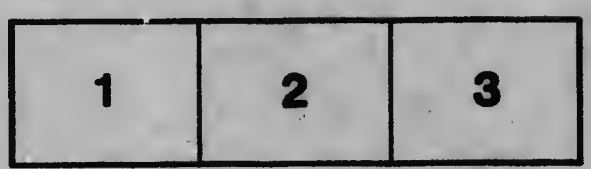

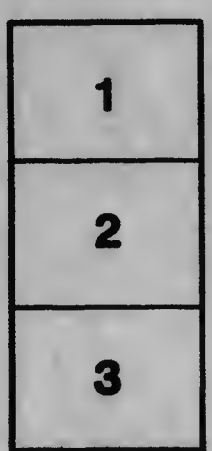

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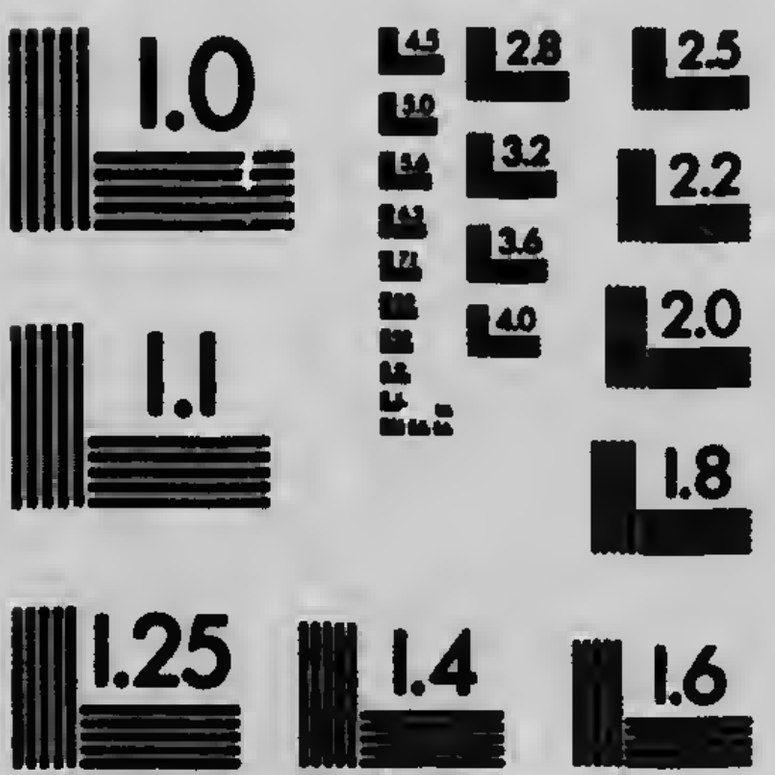

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ESSAYS ON

THE DEVOLUTION OF LAND

UPON

THE PERSONAL REPRESENTATIVE

AND

STATUTORY POWERS RELATING THERETO

WITH

AN APPENDIX OF STATUTES

BY

EDWARD DOUGLAS ARMOUR, K.C.,

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TORONTO:

The Canada Law Book Co.

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PREFACE.

In these essays no attempt is made to speak authoritatively on the interpretation of *The Devolution of Estates Act*—that is to say, in the absence of decisions upon the many points that arise in the course of administration, an essayist cannot refer to authority for the solution of every difficulty. Such cases as have been reported shew the great and many difficulties encountered in an attempt to elucidate its obscure provisions. Instead of a simple enactment vesting the land in the personal representative, and leaving the administration and distribution to well-known principles of law, and thus making the sale of land, on behalf of an estate, ready and easy of accomplishment, and therefore profitable, the Act is so complicated, the powers of executors and administrators are so badly defined and so encumbered with limitations and conditions, that it is almost hazardous to buy either from a personal representative or a beneficiary. Indeed, this is recognized in the Act itself. For amongst somewhat halting sections intended to confirm sales theretofore made (s. 17 and 2 Edw. VII. c. 17, s. 17) the draftsman leaves it to the courts to adjudicate upon certain sales "according to equity and good conscience" (s. 17, s.-s. 3 and 2 Edw. VII. s. 6)—not a very good recommendation of the legislation, nor a very safe guarantee of title.

There are many inconsistencies, chiefly in the amendments; the purpose of many of the sections is quite obscure; the drafting is not to be commended, and it frequently displays want of continuity of thought even within the limits of a single section. Under these circumstances, one could hardly hope to make out of the subject one symmetrical whole. The aim of the writer has been to first ascertain

what interests are within the Act, and then to follow the land, so to speak, from the death of the owner, through the executor or administrator, in course of administration, down to distribution; and to expose, discuss, and, as far as possible, elucidate by authorities, the various points arising. If all the views taken are not accepted, it is hoped that some good purpose will have been served if their discussion leads to a settlement by judicial pronouncement upon them.

Chapters on the Powers of Executors and Administrators under *The Trustee Act*, and respecting distress for rent, have been added to those upon *The Devolution of Estates Act*. But, the writer having already dealt with the powers of personal representatives respecting discharges and assignments of mortgages, and with the subject of Bare Trustees, in his work on Titles, these subjects although germane to these essays are not included.

My thanks are due to Eric N. Armour, Esq., Barrister-at-law, for compiling the index.

E. D. A.

TORONTO, January, 1903.

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York v. Osgoode, 39

ADDENDA ET CORRIGENDA.

P. 22, note (*k*). For "Swanston" read "Swansea."

P. 24, note (*t*) For "s. 2" read "s. 22."

P. 36. To note (*a*) add *Cornwall* v. *Henson*, L.R. (1899) 2 Ch. 710; (1900) 2 Ch. 298.

P. 49. To note (*g*) add *Kemp* v. *S. E. R. Co.*, 41 L.J. Ch. at p. 406.

P. 120, 8th line from bottom. For "shows" read "knows."

P. 128, notes (*s*) and (*u*). To *Fairfield* v. *Ross*, 22 Occ. N., add 4 O.L.R. 534.

P. 177. Add to note (*m*) "also p. 799."

P. 216. To note (*h*) add, In *Re Pettit*, 4 O.L.R. 506, a widow entitled to dower in land sold in administration proceedings died before distribution. Her administrator held entitled to payment of a gross sum in lieu of dower, calculated on her expectation of life according to tables, without regard to the date of her death.

DEVOLUTION OF LAND UPON THE PERSONAL REPRESENTATIVE.

CHAPTER I.

INTRODUCTION.

Enumeration of Statutory Powers.

"The law of real property in this country," said Sir William Blackstone(*a*), "wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he who breaks one link of the chain, endangers the dissolution of the whole." These words are peculiarly applicable to the change in the succession of land from the heir to the personal representative, and, although it is not likely or liable to work dissolution of the whole system, the unseen and unexpected changes are very numerous.

The succession of the personal representative to real estate is not altogether a novelty, however. Estates *pur auter vie*, for which, at common law, there was no owner on the death of the tenant during the life of *cestui que vie*, were, by 29 Car. II. c. 3, and 14 Geo. II. c. 10, rendered liable for debts in the hands of executors and administrators, and made distributable amongst the next of kin.

In later days the estate of a bare trustee was made to devolve upon his death upon his legal personal representatives(*b*); and special powers were given to personal representatives in other cases, such as the power to distrain for arrears of rent(*c*), power to raise money to satisfy charges

(*a*) *Perrin* v. *Blake*, Har. L.T. 498; 10 Ruling Cas. at p. 700.
(*b*) R.S.O. c. 129, s. 7.
(*c*) Ibid. s. 13.

(*d*), power to execute conveyances in pursuance of written contracts to sell made by the testator or intestate(*e*), and power to assign, release and discharge mortgages(*f*). And by *The Married Women's Property Act* (*g*), the legal personal representative of a married woman is declared to have, in respect of her separate estate, the same rights and liabilities, and to be subject to the same jurisdiction, as the married woman would be if she were living.

The Devolution of Estates Act, however, by casting the realty of the deceased upon his personal representative, superseded for the time being, though it did not repeal, all these enactments. And, if it had remained in its original form, they would have been found unnecessary. But that Act, having been amended so as to shift the land, without conveyance, into the beneficiaries, they again become of importance, and deserve, and will receive, separate consideration.

With the exception of the estate of a bare trustee, and, perhaps also, the separate estate of a married woman, there was no vesting of property in the personal representative under these earlier enactments. The powers given them were purely artificial. Thus, the power to distrain while the reversion was in a devisee or heir, the power to convey in pursuance of a contract, where the land descended to the heir or passed by devise to a devisee, were purely artificial, and not dependent upon the right of property. These artificial powers remained even after the passing of *The Devolution of Estates Act,* but conjoined with the right of property given by that Act; and when the property shifts into the beneficiaries under that Act, they no doubt survive in the personal representatives.

(*d*) Ibid. ss. 18 *et seq.*
(*e*) Ibid. s. 24.
(*f*) R.S.O. c. 121, ss. 11, 14.
(*g*) R.S.O. c. 163, s. 23.

We shall thus have to deal with the vesting of property under the larger enactment, and with the artificial powers under the minor Acts, apart from the right of property.

There is also the liability of executors and administrators to execution at the hands of creditors of the testator or intestate, which seems to be an artificial obligation or liability, not dependent upon right of property(*h*); and special powers are given to persons acting as executors or administrators of persons who are supposed to be dead(*i*).

On the other hand, though *The Devolution of Estates Act* casts the land of the deceased upon the personal representative, *i.e.*, although the statute itself vests the land in them in spite of a will, it is still open to a testator to vest his land in his executors by direct devise in the will itself, so that the right of property, though involved with the statutory obligation to discharge or execute a trust, remains in the executor. As where there is a devise in trust for sale and to convert into money, or with powers of leasing and to pay the rents and profits to a beneficiary, etc.; and, as in the case of devises for infants, where the devise is to the executors in trust for the infants, which case is especially excepted from the oversight of the Court respecting the land of infants, which vests by force of the Act itself in the personal representative(*j*).

The Devolution of Estates Act, however, does not purport to cover all species of property. It is confined to estates in fee simple, and estates *pur auter vie*. It will be necessary, therefore, at the outset, to make a comparison of the statutes respecting succession.

(*h*) R.S.O. c. 77, s. 35.
(*i*) R.S.O. c. 131.
(*j*) R.S.O. c. 127, s. 8.

CHAPTER II.

Inheritable and Devisable Interests: a Comparison of the Statutes.

1. *The Composition of the Devolution of Estates Act.*
2. *The Statute of William IV.*
3. *The Wills Act, 1873.*
4. *The Inheritance Act.*
5. *The Devolution of Estates Act.*

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1. *The Composition of the Devolution of Estates Act.*

Before entering upon an examination of the enactment by which the personal representative succeeds to realty, it will be necessary to enquire what interests in land are inheritable and devisable, and how far they have been affected by previous legislation.

The present enactment, now called *The Devolution of Estates Act*(*k*), is composed of three separate enactments. Sections 22 to 36, inclusive, are the statute formerly known as the Statute of William IV., relating to descent, and will hereafter be spoken of, for the sake of brevity, as the Statute of William IV. Sections 37 to 67 constitute what was formerly known as the Statute of Victoria, relating to inheritance, and will be hereafter spoken of as the Inheritance Act. Sections 3 to 21 constitute *The Devolution of Estates Act* as originally passed and amended, and will be hereafter spoken of by that name.

The consolidation of these three enactments indicates that they are all in force, as, indeed, was apparent before;

(*k*) R.S.O. c. 127.

that they are to be construed as *in pari materia*; and that the various groups or sections of the consolidated Act apply only to the interests specially mentioned therein. It could hardly have escaped the attention of the Legislature that they were continuing the older enactments as to interests not included in the later ones. And it cannot be supposed that either of the two later enactments superseded those that went before. The contrast between the various sections of the same Act brings very clearly into a circumscribed view the different dispositions made of the various interests affected.

2. *The Statute of William IV.*

By the Statute of William IV.(*l*), "land" extends to the following interests:—

Messuages, and all other hereditaments, whether corporeal or incorporeal;

Money to be laid out in the purchase of land;

Chattels and other personal property transmissible to heirs;

Any share of the same hereditaments and properties, or any of them;

Any estate of inheritance;

Any estate for life or lives, or other estate transmissible to heirs;

Any possibility;

Any right or title of entry or action;

Any other interest capable of being inherited;

Whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency.

The enacting part of this statute modifies the rules of descent of the common law; and, accordingly, at the date of

(*l*) R.S.O. c. 127, s. 22, s.-s. 1.

its passing, all such interests as are mentioned passed to the heir at law, subject to the provisions of this statute. And if we find that succeeding legislation has not included all of such interests, such as are not included will still pass by descent as provided by that enactment.

3. *The Wills Act, 1873.*

The Wills Act, in operation before 1874, contained an enumeration of interests made devisable identical with the Statute of William IV.

The Wills Act of 1873, which came into operation on 1st January, 1874, made the following interests in land devisable:—

All real estate which, if not devised, would devolve upon the heir at law, whether corporeal or incorporeal hereditaments;

Estates *pur auter vie,* whether limited to the heir as special occupant or not, whether corporeal or incorporeal hereditaments;

All contingent, executory and future interests, whether the testator is or is not ascertained as the person, or one of the persons, in whom the same may become vested, and whether he is entitled thereto under the instrument by which the same were created, or under any disposition thereof by deed or will;

All rights of entry for conditions broken;

All other rights of entry;

Such of the same estates, interests and rights respectively, and other real estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to them subsequently to the execution of his will.

4. *The Inheritance Act.*

The Inheritance Act includes within its provisions "every estate, interest and right, legal and equitable, held

in fee simple, or for the life of another in lands, tenements and hereditaments"; except as in section 59 is excepted, viz., estates in fee simple or for the life of another held in trust for any other person, which descend as if the Act had not been passed.

5. *The Devolution of Estates Act.*

The Devolution of Estates Act is even more restricted in its scope. It applies to the following interests in land:—

All estates of inheritance in fee simple;

All estates limited to the heir as special occupant, from 1st July, 1886, to 12th March, 1902;

All estates held for the life of another, from 13th March, 1902, thenceforth;

In any tenements or hereditaments, whether corporeal or incorporeal;

All real property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable.

From the bare enumeration of the different interests affected by the different enactments, it is abundantly clear that the Statute of William IV. and the Wills Act are of much wider range than the two following enactments; that the Inheritance Act is wider in range than the Devolution of Estates Act; and, consequently, that there are many interests and rights which descend as at common law, or under the Inheritance Act; and many interests and rights which are devisable, but which did not descend under the Inheritance Act, and do not now pass under the Devolution of Estates Act.

We shall consider these interests severally in a succeeding chapter, in examining what interests are, and what are not, within *The Devolution of Estates Act*.

CHAPTER III.

Estates Pur Auter Vie.

1. *Introductory Remarks.*
2. *Title by Occupancy.*
3. *Special Occupant.*
4. *Nature of an Estate* Pur Auter Vie.
5. *The Statute of Frauds: Assets.*
6. *Distribution of such Estates.*
7. *The Statute of William IV.*
8. *The Inheritance Act.*
9. *The Devolution of Estates Act.*
10. *Title by Occupancy, notwithstanding the Statute.*

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1. *Introductory Remarks.*

Estates *pur auter vie* have a history of their own, and will therefore be considered separately. The earliest instance of personal succession to land is that furnished by the statute respecting succession to estates *pur auter vie*, which, in certain cases, were cast upon the personal representatives by the Statute of Frauds. We shall follow these estates through the various Acts affecting them, and may also deduce from them and the cases thereon some theories which may be of use in dealing with the modern legislation.

2. *Title by Occupancy.*

At common law, when an estate was granted to a man for the life of another, and the grantee died during the lifetime of *cestui que vie*, then, anyone who first entered upon the land might lawfully retain the possession as long as

cestui que vie lived, by right of occupancy. The land did not revert to the grantor, for he had parted with all his interest as long as *cestui que vie* lived; it did not escheat to the lord of the fee, for all escheats must be of the entire fee and not of any particular estate carved out of it; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in th grant(*m*); nor could it vest in his executors, for executors could not succeed to a freehold estate, and, therefore, he who first took it could hold it by mere right of occupancy during the life of *cestui que vie*.

3. *Special Occupant.*

But if the land were limited to a man and his heirs, during the life of another, there the heir might enter and hold possession, not because he inherited as heir at law, but because he was specially named in the grant to occupy the land on the death of the grantee; and he was called a special occupant(*n*).

4. *Nature of an Estate* Pur Auter Vie.

In *Doe dem. Blake* v. *Luxton*(*o*), Lord Kenyon, C.J., said: "These questions on estates *pur auter vie* do not frequently arise. Such estates certainly are not estates of inheritance; they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds, because the heir at law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descent*, for these estates were not liable to the debts of the ancestor before the Statute of Frauds."

(*m*) Nor would it have descended as an inheritance, as we shall see, even if such words had been inserted, for the estate was only a life estate.

(*n*) 2 Bl. Comm. 259.

(*o*) 6 T.R. at p. 291.

5. *The Statute of Frauds: Assets.*

To remedy the inconvenience of having the land thrown open to general occupancy in the one case, and to render it liable for debts in both cases, it was enacted by the Statute of Frauds(*p*), "that estates *pur auter vie* shall be devisable by will in writing, signed by the devisor, or by his agent, in presence of three witnesses; and if no such devise be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent; and in case there be no special occupant, it shall go to the executor or administrator of the party who had the estate thereof by virtue of the grant, and shall be assets in his hands." Thus, every estate *pur auter vie* might be devised. If not devised, and there were a special occupant, it passed to him as assets; if there were no special occupant, it passed, like personal property, either to the executor or to the administrator, as assets for payment of debts.

Thus, "if an estate *pur auter vie* be limited to a man, his heirs and assigns, and if it be not devised, it goes to the heir under the Statute of Frauds, and is liable to the same debts as a fee simple is. Where it is granted to a person, his executors, administrators and assigns, the executors take it, subject to the same debts as personalty of any other description, etc."(*q*).

6. *Distribution of such Estates.*

Still, no provision was made for the ultimate distribution of such estates after satisfaction of debts, and consequently another statute was passed(*r*), which made the surplus distributable like a chattel interest.

(*p*) 29 Car. II. c. 3, s. 12.
(*q*) *Atkinson* v. *Baker*, 4 T.R. at p. 230.
(*r*) 14 Geo. II. c. 20.

7. *The Statute of William IV.*

The law so remained in Ontario until the Statute of William IV., respecting descent, was passed(*s*), which modified the common law rules of descent, and which, by including them within its provisions, seemed to assume that estates *pur auter vie* were descendible, and did not pass to the personal representative, although, as a matter of fact, the statutes which cast such estates upon the executor or administrator, were in force here at the time. The effect of this statute was to repeal the Statute of Frauds and the Statute 14 Geo. II. c. 20, and to make such estates pass to the heir according to the rules of the common law, as modified by that statute, instead of to the executors or administrators.

8. *The Inheritance Act.*

When the Inheritance Act was passed, it enacted that estates in fee simple or for the life of another, should descend to the heirs at law as in that Act set out(*t*), and by these two enactments all such estates, which had previously been treated as nearly as possible as if they were estates in fee simple (*u*), became in fact estates of inheritance.

9. *Devolution of Estates Act.*

By *The Devolution of Estates Act,* as originally enacted, all estates "limited to the heir as special occupant(*v*)," passed to the personal representative. It will be observed that only that particular class of estates *pur auter vie* was mentioned by the enactment. Estates *pur auter vie* not limited to the heir were unaffected by it, and descended to the heirs at law under the Inheritance Act as before.

(*s*) Now R.S.O. c. 127, s. 22, s.-s. 1.
(*t*) R.S.O. c. 127, s. 31, s.-s. 1.
(*u*) See *Re Barber's Settled Estates,* 18 Ch. D. 624.
(*v*) R.S.O. c. 127, s. 3 (*a*).

There was a reason, though not a sound one, for this. It is to be accounted for in this way. *The Devolution of Estates Act*, as originally enacted, was a copy of a bill introduced into the Imperial House of Commons, but never passed(*w*). In England, estates for the life of another, not limited to the heir as special occupant, were already, by the Statute of Frauds, made to devolve upon the executors or administrators for payment of debts and distribution; and, consequently, it was not necessary to include them in the proposed new enactment, which, therefore, was drawn to include only estates limited to the heir as special occupant. When the measure was introduced in this Province, it was evidently overlooked that, by Provincial legislation, all estates *pur auter vie* passed to the heirs at law, and that the English bill was not suited to our circumstances. And, as the Act passed in the form in which it was introduced, there followed the peculiar result that estates *pur auter vie*, where there was no special occupant, descended to the heirs at law under the Inheritance Act, while estates limited to the heir as special occupant devolved upon the executor or administrator under *The Devolution of Estates Act*(*x*). In other words, where the estate *pur auter vie* was not limited to the heir, it descended to the heir; where it was limited to the heir, it did not descend to him, but devolved upon the personal representative.

In 1902 an amendment was made whereby all estates for the life of another pass to the personal representative(*y*).

(*w*) In *Martin* v. *Magee*, 18 App. R. at p. 388, Osler, J.A., says that the provisions are apparently taken from a New South Wales Act, but a comparison will show that they are not identical in words. The writer saw a printed copy of the English bill some years ago from which our Act was copied.

(*x*) The difference between the two enactments, R.S.O. c. 127, s. 3 (*a*) and s. 38, s.-s. 1, seems not to have been called to the attention of the court in *Wilson* v. *Butler*, 2 O.L.R. 576, where it was held that land limited to one for the life of another simply passed to the personal representatives of the tenant *pur auter vie*.

(*y*) 2 Edw. VII. c. 1, s. 3.

10. *Title by Occupancy notwithstanding the Statute.*

It was said by Blackstone(*z*) that by the Statute of Frauds and that of Geo. II. the title of common occupancy became utterly extinct and abolished, though the title by special occupancy continued. But this is not certain. Where the tenant *pur auter vie* of land not limited to the heir as special occupant, died intestate, a period necessarily elapsed between his death and the grant of letters of administration, during which there was no owner of the land. The Statute of Frauds made it assets in the hands of the administrator, but did not provide for its occupancy before letters were granted. The common law was not changed to any greater extent than the Statute of Frauds demanded. The heir could not succeed. There was no owner assigned, there was no provision for distribution of the surplus after payment of debts; so that the next of kin could not even claim a potential interest. The inexorable feudal rule remained in full force that the freehold must not be in abeyance. The land still remained open to be seized upon and appropriated by the first person who should enter. It was idle to argue that the title of the administrator who might afterwards be appointed would accrue by relation from the death of the intestate; for the feudal law knew nothing of such relation back, but demanded an immediate and present tenant, ready at all times to perform the feudal duties; and there is no case known whereby the maxim that the freehold must not be in abeyance is displaced by the argument that the title of a future owner, when it accrues, will serve to excuse the vacancy before the accrual of his title. It was, therefore, Preston's opinion that the title by occupancy was not destroyed by the Statute of Frauds, and that of Geo. II.(*a*). It was argued that the personal

(*z*) 2 Comm. 260.

(*a*) 1 Conv. 44.

representative might in such cases take as a special occupant. But that does not get rid of the difficulty caused by the vacancy before the appointment of an administrator. Though the question ceased to be of importance with respect to such estates while they were governed by the *Inheritance Act* already referred to, which cast them upon the heirs at law, the learning is still of value when we come to consider the case of these estates as affected by *The Devolution of Estates Act*, which casts them into the same plight.

The limitation, such as it is, must now be considered, not as the nomination of some person to take the land as a special occupant after the grantee's death in the lifetime of *cestui que vie*, but as the mere description of such an estate as will pass to the administrator upon intestacy; and until an administrator is appointed, the land is again vacant, the heir being excluded, for a time at least, or rather non-existent, since the estate is to be "distributed" among the next of kin as personalty after the payment of debts. It is true that, inasmuch as the land is assets for payment of debts, any person taking possession might become an executor *de son tort*, and liable to account for the profits if an administrator were subsequently appointed. But if no administrator were appointed, and the land shifted into the next of kin, at the expiration of a year (now three years) from the death of the intestate, would the occupant in the interval be accountable to them? or could he not set up a title of occupancy for the year? This is more fully treated of hereafter(*b*).

(*b*) Chapter VII.

CHAPTER IV.

Interests Within the Devolution of Estates Act.

1. *What the Act Includes: Estates in Fee Simple.*
   - (i) *Equitable Estates.*
   - (ii) *Vested Remainders in Fee.*
   - (iii) *Land Under Contract of Sale.*
2. *Trust Estates.*
   - (i) *Effect of ss. 2, 37 and 59.*
   - (ii) *Mode of Transferring Trust Property.*
   - (iii) *Devise of Trust Estate.*
   - (iv) *Estate of Bare Trustee.*
3. *Money to be Laid Out in Land.*
4. *Rights of Entry on Disseisin.*
5. *Inheritable Chattels.*
6. *Land Appointed by Will.*
   - (i) *Nature of Power as Distinguished from Property.*
   - (ii) *When Property Appointed Forms Part of Estate.*
   - (iii) *Examples of Foregoing.*
   - (iv) *Examples where Property Follows the Settlement.*
   - (v) *Conclusion.*

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1. *What the Act Includes: Estates in Fee Simple.*

The Devolution of Estates Act seems to have contemplated the inclusion of the simplest cases of ownership. It is not within the design of the Act that either land in settlement (except in such simple cases as where there is a vested remainder in fee), or executory and other interests

not amounting to estates, should devolve upon the personal representative. And thus, as to freeholds, it includes only estates of inheritance in fee simple and estates for the life of another, in tenements and hereditaments, corporeal and incorporeal, and property comprised in any disposition made by will in exercise of a general testamentary power of appointment.

The expression "estates of inheritance in fee simple" is too clear and definite to require much comment. But it may be predicated of it that it was not intended to include anything that cannot be technically termed an estate, for we shall find that there are many inheritable and devisable interests that are not estates.

And of fees, it will include only fees simple properly so called, and not determinable or other fees than those that are simple or absolute. "Of fee simple it is commonly holden that there be three kinds, viz.: Fee simple absolute, fee simple conditional, and fee simple qualified, or a base fee. But the more genuine and apt division were to divide fees, that is, inheritance, into three parts, viz.: simple or absolute, conditional, and qualified or base. For this word (simple) properly excludeth both conditions and limitations that defeat or abridge the fee(*c*)."

"A fee may be had in all lands, and all subjects existing in the land, as buildings; in all things issuing out of or chargeable on the land, as rents, commons, estovers, tithes; and in all things which may continue forever, as a personal annuity, duties, or an annuity payable out of these duties. In short, there may be an estate in fee in every subject, except personal chattels, and even some personal chattels may be heir-looms, and as such, of the nature of an inheritable subject. And in the contemplation of Courts of Equity, there may be money land, or rather money convertible, by its application in purchases, into land; and in

(*c*) Co. Litt. 1 (*b*).

the meantime the right of succession to the money will in equity be in the same manner as if the money had been invested in the purchase of land; viz., the heir will exclude the executor, etc.(*d*)"

(i) *Equitable Estates.*

The enactment will also include equitable estates in fee, though not necessarily purely equitable interests(*e*). Thus the estate in fee of a mortgagor and the estate in fee of a *cestui que trust* will both be included, both being properly designated in technical terms as equitable estates of inheritance in fee simple. So, also, would it include the interest of a purchaser of land, before conveyance, where he has paid all his purchase money, and performed all the conditions of his contract, so as to constitute the vendor a bare trustee for him.

(ii) *Vested Remainders in Fee.*

And, as to future estates, the term will include all vested remainders and reversions in fee simple, but not contingent or executory interests which are not estates(*f*).

(iii) *Land Under Contract of Sale.*

Where land is under contract of sale, the vendor still has the legal estate in fee, and it will thus fall directly within the words of the statute. Moreover, such a case seems to have been deliberately covered by the wording of s. 4, s.-s. 1:—"And so far as the same is not disposed of by deed, will, *contract*, or other effectual disposition, the same shall be distributed, etc." Consequently, where the estate has been disposed of by contract, it vests in the per-

(*d*) 1 Preston on Estates, 506.
(*e*) See post. Chapter V. as to a purchaser's interest.
(*f*) See post. Chapter V.

sonal representative subject thereto. Whether it will pass further and shift into the next of kin or devisees at the end of the year, subject to the contract, depends upon other considerations. It may be argued that as the Act was intended to provide for the distribution of the beneficial estate of the deceased, only such property as was beneficially owned can be "distributed," and, therefore, only such property would shift under the statute. And, by analogy to the cases of devises in trust for sale, in which it has been held that land which the testator had contracted to sell passed to his devisees notwithstanding the argument that he could not have intended to vest in his trustees for sale what he had already contracted to sell(*g*), it might be held under this enactment that such land passed to the personal representative, but does not shift into his beneficiaries. There is, however, another consideration, namely, that *The Trustee Act*(*h*), enacts that "where any person has entered into a contract in writing for the sale and conveyance of real estate, or of any estate or interest therein, and such person has died intestate, or without providing by will for the conveyance of such real estate. . . . then the executor, administrator, or administrator with the will annexed (as the case may be) of such deceased person, shall make and give to the person entitled to the same a good and sufficient conveyance. . . . and such conveyance shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity." While this artificial power to make a conveyance under such circumstances exists, it is purely an academic question as to what becomes of the land by devolution or otherwise in such cases, and so we may conclude that by the combined operation of the two

(*g*) *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 449.

(*h*) R.S.O. c. 129, s. 24.

enactments a vendor's estate in land contracted to be sold, in such cases, passes to his personal representatives, and by them may be conveyed in fulfilment and satisfaction of the contract; and if the contract be not fulfilled, is held in trust for, or by operation of law shifts into, the beneficiaries of the deceased.

2. *Trust Estates.*

(i) *Effect of ss. 2, 37 and 59.*

The enactments respecting the devolution of an estate held by a trustee are in a state of almost inextricable confusion. Instead of a simple, unequivocal enactment, which would vest such estates either in the personal representative or an heir at law (it matters not which, so that it be certain), so that, without any possible doubt being cast upon the title, the trust estate might be conveyed to the new trustees upon their appointment, we have several sections of the Act, each one contradictory to the others, so that it is left either to conjecture or arbitrary adjudication to ascertain how such an estate will descend on the death intestate of a trustee.

We have now to consider the effect of these three sections. They are sections 2, 37 and 59. Section 2:—"Sections 3 to 10 inclusive of this Act shall apply only to the estates of persons dying on and after the 1st day of July, 1886." If this stood alone, trust estates might be held to be included in the expression "estates of inheritance, etc.," notwithstanding some of the provisions of *The Devolution of Estates Act*, to which we shall presently refer.

Section 37, latter part, enacts as follows:—"Sections 56 to 67 inclusive shall, as to the estates of such last mentioned persons [persons dying on or after the 1st day of July, 1886], apply only subject to the provisions of sections 1 to 21, inclusive." This, too, is plain enough, namely, that,

subject to the right of the executor or administrator, the matters dealt with in sections 56 to 67 shall be dealt with under these sections, *e.g.*, the right of posthumous children to share, the exclusion of illegitimate children, hotchpot, and trust estates.

But section 59 enacts as follows:—"The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding twenty-two sections of this Act, nor . . . . shall the same affect. . . . any estate which, although held in fee simple, or for the life of another, is so held *in trust* for any other person, but all such estates shall remain, pass and descend, *as if the last twenty-two sections of this Act, numbered from 37 to 58, both inclusive, had not been passed.*"

We thus have section 37 enacting that section 59 shall apply to the estates of persons dying on or after 1st July, 1886; and section 59 declaring that trust estates shall descend as if section 37 had not been passed declaring that it should apply to such estates. It seems impossible to harmonize these two sections; and if they are hopelessly in conflict, the latter must govern. If, then, we exclude section 37 from contemplation, we have two sections to deal with, sections 2 and 3, declaring that estates of inheritance on and after 1st July, 1886, shall devolve upon the personal representative, and section 59, declaring that they shall descend as if the Inheritance Act had not been passed. But, unfortunately, section 37 distinctly enacts that sections 1 to 27 of *The Devolution of Estates Act* shall apply. And so we must read section 59 as declaring that trust estates shall descend as if it had not been enacted that *The Devolution of Estates Act* had not been made applicable. In turn, these sections seem to cancel each other, and we can only turn to the general provision of the Act, making *The Devo-*

lution of Estates Act apply to all estates of inheritance in fee simple.

This conclusion is not reached without a good deal of hesitation and doubt. For *The Devolution of Estates Act* appears to apply only to beneficial estates, *i.e.*, estates capable of being rendered liable to the debts of the deceased, and to distribution amongst his next of kin. And the subsequent provisions of the Act as to shifting into beneficiaries without conveyance, reverting to the personal representative by registration of a caution, and so forth, are applicable only to estates beneficially owned by the deceased. But as the distribution is to take place only in "so far as the said property is not disposed of by deed, . . . contract, or other effectual dispotition," it may be held that as trust estates are subject to contract or other effectual disposition, they remain in the hands of the personal representative, subject to the deed of settlement.

(ii) *Mode of Transferring Trust Property.*

Happily, it is not necessary, in practice, that the question should be solved. For, where the instrument by which a new trustee is appointed contains a declaration by the appointor that the trust estate shall vest in the person appointed as trustee, such declaration shall, without any conveyance, vest the estate in the new trustee(*i*). So that the difficulty may be avoided when a sole trustee dies intestate, or even testate, by a declaration under the statute.

(iii) *Devise of Trust Estate.*

Where the trustee devises the trust estate to his executors in trust to convey to the new trustees, it will no doubt remain there awaiting conveyance by them, or divesting by such a declaration as has been mentioned. Where it is

(*i*) R.S.O. c. 129, s. 5.

devised to a devisee in trust to convey, and in the meantime to hold until conveyance, it seems impossible to avoid the conclusion that it will pass to the executor; for the statute expressly says that notwithstanding any testamentary disposition it will pass to the executor, subject to the disposition by will. The only escape from this is to hold that trust estates are not included in the Act, and that would cast them upon the heir at law under the statute of William IV., a conclusion which we have already abandoned.

(iv) *Estate of Bare Trustee.*

The estate held by a bare trustee is not within the enactment. Such estates are expressly cast upon the personal representative by another statute(*j*). A bare trustee is a "trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust,* be compellable in equity to convey the estate to them, or by their direction"(*k*).

3. *Money to be Laid Out in Land.*

"Nothing is better established," said Sir Thomas Sewell, M.R., "than this principle: That money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed,

(*j*) R.S.O. c. 129, s. 7.

(*k*) Dart, V. & P. 6th ed. 587; *Christie* v. *Ovington,* 1 Ch. D. 279; *Re Cunningham and Frayling,* L.R. (1891) 2 Ch. 567; but see *Morgan* v. *Swanson,* 9 Ch. D. 582.

the owner of the fund, or the contracting parties, may make land money or money land. The cases establish this rule universally''(*l*).

And so where money was directed to be converted into land, the husband of the woman entitled to the inheritance was held to be entitled to his estate by the curtesy(*m*), and all the rules of inheritance of land were applied(*n*).

And money so converted passed under a devise of real estate(*o*), and under a devise in the words ''all my estates whatsoever and wheresoever''(*p*).

And in another case(*q*), the proceeds of the sale of lands were held to pass under a residuary devise of land, the money being impressed with a trust to be laid out in the purchase of other lands.

''Money to be laid out in the purchase of land'' is expressly mentioned in the statute of William IV.(*r*), and was included in the Inheritance Act as an equitable estate or interest held in fee simple, and would no doubt be included in the expression, estate of inheritance in fee simple, in *The Devolution of Estates Act.*

As the contest in cases of conversion was between the heir at law and the administrator it might be concluded that conversion, for all practical purposes, is abolished or superseded by the effect of *The Devoluton of Estates Act,* inasmuch as both realty and personalty go to the administrator, and are distributed amongst the next of kin. But it may

(*l*) *Fletcher* v. *Ashburner,* 1 Wh. & T. L.C. 7th ed. 329.

(*m*) *Sweetapple* v. *Binden,* 2 Vern. 536; *Cunningham* v. *Moody,* 1 Ves. Sr. 176.

(*n*) *Edwards* v. *Countess of Warwick,* 2 P. Wms. 171; 2 Bro. P.C. 494; *Cunningham* v. *Moody,* 1 Ves. Sr. 176; *Lancy* v. *Fairchild,* 2 Vern. 101.

(*o*) *Lingen* v. *Sowray,* 1 P. Wms. 176.

(*p*) *Rashleigh* v. *Master,* 1 Ves. Jr. 201.

(*q*) *Re Duchess of Cleveland's Settled Estates,* L.R. (1893) 3 Ch. 244; see p. 249, 250.

(*r*) R.S.O. c. 127, s. 22, s.-s. 1.

still be necessary to retain the doctrine, since personal estate is still the primary fund for payment of debts; dower, and curtesy are preserved; and where there is a residuary devise or bequest, the real and personal property therein comprised bear the debts ratably, unless a contrary intention appears from the will(*s*). And a devise in general terms of realty might still include money directed to be laid out. It is true that the section of the Act which provides for the shifting of land into beneficiaries without conveyance, and the recovery thereof by registration of a caution, cannot be applied to money, but this is matter of conveyance only and not title, and cannot alter the well established doctrine.

4. *Rights of Entry on Disseisin.*

Rights of entry may be divided into two kinds—rights of entry on disseisin and rights of entry for condition broken. They differ entirely in principle, and must be treated separately. We shall treat here of the rights of entry on disseisin, which though not expressly within the enactment, will be found to be inseparable from the estate itself.

It seems impossible that there should be a right of entry with respect to a present estate separate from ownership, or a present ownership without the right of entry on the land. And that is indeed the case; and the subject would not have received more than a passing mention had not another section of the statute under consideration(*t*), as well as *The Wills Act* (*u*), expressly mentioned rights of entry, and had not a consideration of all devisable and inheritable interests been incomplete without an examination of these rights.

(*s*) R.S.O. c. 127, s. 7.
(*t*) S. 2, s.-s. 1.
(*u*) R.S.O. c. 128, ss. 2, 10.

In dealing with the position of the disseisor, we shall find that he has not an estate of inheritance in fee simple, because the disseisee has. And while it is clear that the estate of a person disseised is within the Act, it may still be well to call attention to the mode by which we arrive at the conclusion that it makes no difference that a right of entry as such is not expressly mentioned.

At common law, when the owner in fee was actually disseised, his estate was turned into a right of entry. As an actual disseisin, the disseisee could not devise(*v*) or dispose of his lands, inasmuch as he had but a right of entry, which the policy of the law against maintenance would not allow him to part with(*w*). In order to determine whether the claimant was out of possession under circumstances that turned his estate into a right of entry, it became necessary to enquire into the nature of the disseisor's possession; and thus the doctrine of adverse possession was founded(*x*). If the disseisor died in possession, the law cast his seisin upon his heir at law, and the latter now being in by the law, or having an interest which the law recognized, the disseisee had no right of entry upon him, but was driven to his action. The distinction is thus explained by Burton(*y*):—"The distinction taken in the present section between rights of entry and rights of action, though it accord with the strict language of ancient law, may seem, when referred to the ordinary practice of our time, to require explanation. It should be observed then, that the right of action here spoken of is the right of bringing a real action, *i.e.*, one in which the inheritance, or at least the freehold, is the thing immediately in demand, and which must, therefore, in all cases be brought against the actual tenant of the freehold. But this is not the only, nor

(*v*) Jarman on Wills, 5th ed. 50.
(*w*) Sm. L.C. 10th ed. 633, 634.
(*x*) Ibid. 634, 635.
(*y*) Burton on Real Prop. 8th ed. ss. 402, 403.

by any means at this day, the most usual judicial proceeding by which the right to land may be vindicated or decided. The right of entry involves in itself a right of action of a different kind, namely, the right of bringing an ejectment''(*z*).

Was this right of entry an estate? Fearne thus describes the situation(*a*), and shows that, as long as the right of entry remained, the claimant had a sufficient estate to support a contingent freehold remainder(*b*). This is the most severe test that could be applied, for the feudal rules were inexorable. "Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient if there subsists a right to such preceding estate at the time the remainder should vest, *provided such right be a right of entry* and not a right of action only; for *whilst a right of entry remains, there can be no doubt but the same right of entry can exist only in consequence of the subsistence of the estate*; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not; for the action is nothing more than the means of deciding this question. Another estate is in the meantime acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought." And Butler, in a note to this passage, says, that on a disseisin, "the party disseised, even during the disseisin, is considered in law to be the rightful tenant."

The modern Statute of Limitations has abolished the distinction between rights of entry and rights of action. At the common law, if the disseisee could not enter, he

(*z*) See also Darby & Bos. 2nd ed. 272, 373.
(*a*) Fearne C.R. 286.
(*b*) And see Williams on Real Prop. 19th ed. 360.

might make continual claim near the land, which kept alive his right of entry. By our present Statute of Limitations continual claim is abolished, but at the same time the right of entry is not to be tolled or taken away by descent cast(*c*). The effect is that the right of entry, such as it was, is preserved, for the whole statutory period during which an action may be brought to recover the land, and at the expiration of that period, if no action be brought or entry made, the title to the land is extinguished(*d*). Thus the right of entry and the property in the land are co-existent and co-extensive. The estate subsisting, the right of entry exists only in consequence thereof.

And so the matter has been treated in dealing with the conveyance of land from which the owner is ousted. By a statute of 32 Hen. VIII. c. 9, s. 2, pretenced titles could not be conveyed; and consequently, when an owner was ousted he could not convey his land. By a later statute(*e*), a right of entry, which means a right of entry on disseisin(*f*), may be assigned by deed. A conveyance of the land is equivalent to a conveyance of the right of entry, and although the statute of Henry VIII. is not repealed by the later enactment, such a sale is not now a sale of a pretenced title(*g*).

There may however be a right of entry or action to set aside a conveyance which is good until it is set aside. Thus where land is sold for taxes and the sale is irregular, the true owner has a right of action to set aside the deed, and a right of entry against the tax purchaser if he is in possession. This right has been described by Osler, J.A., as a "mere right of entry"(*h*). Such a right, being so described, is not an estate of inheritance in fee simple, and would not be within *The Devolution of Estates Act*.

(*c*) R.S.O. c. 133, ss. 8, 9, 10.
(*d*) Ibid. s. 15.
(*e*) Now R.S.O. c. 119, s. 8.
(*f*) *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635.
(*g*) *Jenkins* v. *Jones*, 9 Q.B.D. 128.
(*h*) *Hyatt* v. *Mills*, 19 App. R. at p. 338.

5. *Inheritable Chattels.*

There are certain things which, though they are *prima facie* chattels, go as part of the inheritance, such as fish in a pond, being profits of the freehold(*i*), deer in a park, doves in a dove-house, etc.(*j*). And these would pass with the inheritance to the personal representative under the Act.

Heir-looms, in their technical sense, are such goods and chattels as go by *special custom* to the heir along with the inheritance. They are due by custom and not by the common law(*k*). As there is no local custom in this country, it follows that there is no such thing, technically speaking, as an heir-loom. It is sometimes said that personal chattels may be constituted heir-looms by settling them in such a way as that they go with the inheritance. But it is obvious that in such a case they devolve in obedience to the settlement and not by the law, whereas heir-looms pass with the inheritance by the law. In other words, an estate in fee simple is not thus created in things in which an estate cannot exist.

6. *Land Appointed by Will.*

Amongst the other interests affected by the Act are real and personal property appointed by will in exercise of a general testamentary power. "All real or personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section if otherwise applicable"(*l*).

In connection with this we must read section 29 of *The Wills Act* (*m*): "A general devise of the real estate of the

(*i*) *Parlet* v. *Cray*, Cro. Eliz. 372.
(*j*) Crabb on Real Prop. 21.
(*k*) Crabb on Real Prop. 11; Jacob's Law Dict., Heir-looms.
(*l*) R.S.O. c. 127, s. 3, last part.
(*m*) R.S.O. c. 128.

testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will." And the same provision follows as to personal estate.

(i) *Nature of Power as Distinguished from Property.*

"A general power of appointment is broadly distinguishable from property, but in its practical results, and in what I may call its market value, it is really equivalent to property. The donee may deal with it as he pleases. He may not only release it, but may sell it, or bind himself to exercise it in any way he pleases. This is equally true whether the power is to be exercised by deed, by deed or will, or by will only. In the last case, of course, there is more practical risk, because a man cannot make a will which will operate previously to his death. But no legal difficulty arises, and cases frequently occur where a man has a general power of appointment and deals with it, either by covenant or otherwise, as property—that is to say, he treats the subject of the power as property over which he has control"(*n*).

Property, then, which the donee of the power may practically dispose of as his own by will, is to be treated as his own and pass to his executors, subject to payment of debts, if the section is "otherwise applicable." The section in which this appears defines the estates to which the Act applies, and presumably, therefore, the expression "otherwise applicable" means if the interest appointed is an estate of inheritance in fee simple or for the life of another.

(*n*) *Per* Kekewich, J., *Re Bradshaw*, L.R. (1902) 1 Ch. 436 at p 477.

(ii) *When Property Appointed Forms Part of Estate.*

We have now to examine under what circumstances property appointed by will can become so much a part of the testator's estate as to vest in his executors for payment of his debts and distribution amongst the appointees.

The principle upon which an appointment operates is that the estate created by the exercise of a power takes effect in the same manner as if it had been created by the deed which raised the power(*o*). The deed raising the power and the deed of appointment form one instrument, and the appointee claims under the original deed. But when an appointment is made by will, though there is the same result as to title, yet courts of equity intercept the property in transit, and treat it as assets for the payment of the testator's debts, in preference to allowing it to go to the appointee. And this policy of the Courts of Equity is now adopted and made part of the general law by the enactment now under review.

Where the appointment has been made, and the appointee has become entitled, there is no difficulty in treating the subject matter as part of the testator's estate, he having exercised dominion over it as effectually as if he had owned it, though in different form. But where the appointment, though effectually made in form, fails by reason of the death of the appointee in the testator's lifetime, or for any other reason, then the question arises whether the subject matter of the appointment is to be subjected to administration, or is to go to the person entitled under the settlement in default, or on failure of, appointment. The test applied in such cases is this—has the testator so dealt with the property as to take it out of the settlement *altogether,* or has he only affected to appoint for the special purpose of giving the appointee named the benefit of the gift? If

(*o*) Sugden on Powers, 8th ed. 470, s. 1.

the latter were his only intention, then it is obvious that if the appointee fails to enjoy the benefit, the persons entitled in default, or on failure of, appointment, take the property under the settlement.

But if the donee of the power so exercise it by will as to indicate beyond question that he intends the property to become part of his estate, then it is so treated; and as it is by this means taken entirely out of the settlement, it falls into his estate if the appointment fails as to its object. "The question in all cases of the class now before me," said the Vice-Chancellor of Ireland(*p*), "is one of intention, namely, whether the donee of the power meant, by the exercise of it, to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition." And Lord Romilly, M.R., said(*q*), "I think the cases which have been referred to merely amount to this, and I am quite sure my own decisions merely amount to this, namely, the donee of a power gives property to his executors, thereupon the executors take it as part of the property of the appointor, and as in that character they do not take it beneficially, they take it on trust, that is, first to pay creditors, and then the legatees, and if there are no legatees, then in trust for the next of kin of the appointor"(*r*).

In a recent case(*s*), it is said to be familiar law that where a person has a general power and exercises it, the fund which is the subject of the power becomes assets for payment of debts. And the duty of the executor is thus described(*t*):—"When the executor has thus obtained the

(*p*) *Re De Lusie's Trust*, 3 L.R. Ir. at p. 237.
(*q*) *Bristow* v. *Skirrow*, L.R. 10 Eq. at p. 4.
(*r*) And see Sugden on Powers, 8th ed. 467.
(*s*) *Re Moore*, L.R. (1901) 1 Ch. 691.
(*t*) At p. 694.

fund, what is his duty? His duty is, if necessary, to use the fund as assets for payments of debts, and his duty towards the appointees is only to hand over to them what remains after discharging that first duty. It seems to me quite plain from that, that he is not simply constituted a trustee in the sense that he steps into the shoes of the trustees of the deed for the purpose of administering the fund towards the appointees; it is obvious that he has another duty which the trustee of the deed had not, namely the duty before he hands anything to the appointees to take the whole fund, or as much as is necessary, to satisfy the debts of his testator. I ask myself, whence did he get that? How did any right in respect of that come to him? I know of no source from which it can come to him, except from the fact, as the Lord Justice says, that he has proved the will; it is because he has proved the will as executor that he gets the fund and applies it, if necessary, in discharging his testator's debts; and he only becomes trustee in the sense of trustee of the fund for the appointees, at the date when he has discharged that first duty."

(iii) *Examples of Foregoing.*

In each case it will be a matter of interpreting the will, to ascertain whether the appointment simply affects to appoint to the object, and to leave the property subject to the settlement if the appointment fails, or to take it completely out of the settlement and make it part of the estate of the donee in case of failure of appointment(*u*). An example or two will sufficiently explain this. S. had a general power of appointment over real and personal property, which was subject to gifts over in default of appointment. She appointed by will to her three brothers, one of whom died in her lifetime, and charged all her estate with payment of debts, and in other ways treated the subject of the power

(*u*) *Re Boyd*, L.R. (1897) 2 Ch. 232, at p. 235.

as if it were her own. It was held that there was a sufficient indication of intention to make the property her own, and the share of the deceased brother became part of her estate(*v*).

A testatrix, having a general power of appointment over a fund in the hands of trustees, by will appointed the fund to remain in the hands of the trustees to pay legacies. She referred to the property in her will as her own, and appointed as executors the trustees and another. It was held that the property was all taken out of the settlement, and that lapsed shares became part of her estate, and did not go under the settlement in default of appointment(*w*).

A testatrix, having a power of appointment under a settlement, by will appointed all the property over which she had a disposing power *to her executors*, and gave legacies which did not exhaust the fund. It was held that the fund was converted into general personal estate, and the unexhausted portion belonged to her husband, who survived her(*x*).

A testatrix, having under a settlement a general power of appointment over real estate, made a disposition by will in which she treated the property subject to the power, together with her own property, as if it were all her own, and it was held that there was sufficient intention expressed to make the property which was the subject of the power her own for all purposes, and, the appointment failing, that the land went to her heirs and not to the persons entitled in default of appointment(*y*).

(*v*) *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238.
(*w*) *Re Pinède's Settlement*, 12 Ch. D. 667.
(*x*) *Brickenden* v. *Williams*, L.R. 7 Eq. 310.
(*y*) *Coxen* v. *Rowland*, L.R. (1894) 1 Ch. 406.

(iv) *Examples Where Property Follows the Settlement.*

On the other hand, where a testatrix by will appointed a fund, but spoke also of "her own moneys," which she also disposed of by the will, it was held that the exercise of the power was for the limited purpose of appointing to an object only, and that she did not regard the subject matter of the power as part of her estate, and, as the object of the power did not take, the share went in default of appointment under the settlement(*z*).

(v) *Conclusion.*

The result is that where there is such a power, and the testator actually exercises it by will, the appointee, nevertheless, takes subject only to the payment of the debts of the donee of the power, and the statute vests the property in the executor for payment of debts and distribution in the same manner as if it were property of the testator.

And where such an appointment fails, still, if the intention of the testator is clear to take the property out of the settlement altogether and make it his own, it falls into his estate and passes to his executors under the Act.

(*z*) *Re Boyd*, L.R. (1897) 2 Ch. 232; see also *Re Davies*, L.R. 13 Eq. 163.

CHAPTER V.

Interests Not Within the Act.

1. *A Purchaser's Interest.*
   - (i) *Cases Adverse to Theory of Estate.*
   - (ii) *Cases in Favour of Theory of Estate.*
   - (iii) *Deductions from the Cases.*
   - (iv) *Argument Against Theory of Estate.*
2. *Options.*
   - (i) *Decision That Option Passes an Interest.*
   - (ii) *Contrary Decisions.*
3. *Determinable Fees.*
4. *Base Fees.*
5. *Contingent Remainders.*
6. *Executory and Future Interests.*
7. *Possibilities.*
8. *Wrongful Seisin.*
9. *Rights of Entry for Condition Broken.*
   - (i) *Where There is no Reversion.*
   - (ii) *Where There is a Reversion.*
10. *Free Grant Lands.*

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1. *A Purchaser's Interest.*

Having come to the conclusion that money directed to be laid out in land is within the Act, it might at first sight seem to be contradictory doctrine that a purchaser's interest is not within the Act. But the distinction is manifest. Money directed by a testator or settlor to be laid out in land is impressed with a trust, and *must* be so laid out, if not in one piece, yet in another. But a purchaser's interest is conditional on title being made out, and if the con-

tract fails he may never attempt another purchase. The solution of this question must depend upon this consideration.

The relationship of vendor and purchaser is almost universally described as that of trustee and *cestui que trust*, while the contract is *in fieri*; and, therefore, we might hastily infer that the purchaser, upon execution of the contract, immediately becomes entitled to an equitable estate of inheritance in fee simple, and that this estate would, on his death, devolve upon his personal representative under the Act. But an examination of the *dicta* upon this question discloses a by no means monotonous uniformity of opinion, but, on the contrary, a somewhat fanciful variety of expressions at least, if not of doctrine. And while in many of the cases in the House of Lords we find the relationship unequivocally described as a trust, and the purchaser's interest as an equitable estate, these opinions, on the one hand are always qualified by the conclusions in the particular cases, and, on the other hand, have not been accepted by the Courts below as finally settling the question. We may be excused, then, for quoting somewhat largely from the various opinions expressed on the subject, in order to ascertain whether it can be predicated of such an interest that it amounts to an estate.

(i) *Cases Adverse to Theory of Estate.*

First, as against the theory of an estate. Speaking of the vendor, Sir Thomas Plumer, M.R., said(*a*), "Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again

(*a*) *Wall* v. *Bright*, 1 J. & W. at pp. 501 *et seq.*

becomes the absolute owner. . . . The ownership of the purchaser is inchoate and imperfect, it is in the way to pass, but it has not yet passed. . . . The vendor is, therefore, not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over the estate."

"When a man agrees to sell his estate, he is trustee of the legal estate for the person who has purchased it as soon as the contract is completed, but not before(*b*)."

In *Rayner* v. *Preston*(*c*), where the premises were burned pending the contract, and the purchaser claimed credit for the insurance money, on the ground that it took the place of the property, Cotton, L.J., said(*d*): "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and, so far as he is a trustee, he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion." In this same case Brett, L.J., said(*e*): "But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. . . . Now it has been

(*b*) *McCreight* v. *Foster*, 5 Ch. App. at p. 610, *per* Lord Hatherley.

(*c*) 18 Ch. D. 1.

(*d*) At p. 6.

(*e*) At p. 10.

suggested that when that takes place, *i.e.*, the purchase money is ready and the title made out, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law(*f*)."

Lord Westbury, in *Knox* v. *Gye*(*g*), said: "The vendor is called a trustee only by a metaphor, and by an improper use of the term; . . . though the vendor might be called a trustee, he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. . . . The application to a man who is improperly, and by a metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor."

The rule that by a contract of purchase the purchaser becomes in equity the owner of the property, "applies," said Lord Cottenham(*h*), "only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the pur-

(*f*) See also *Edwards* v. *West*, 7 Ch. D. 858, at p. 862.
(*g*) L.R. 5 H.L. at p. 675.
(*h*) *Tasker* v. *Small*, 3 My. & Cr. at p. 70.

chaser cannot, against a stranger to the contract, enforce equities attaching to the property."

In a proceeding to ascertain whether purchasers were "freeholders" within the meaning of *The Municipal Act*, and so qualified to petition for the incorporation of a village, it was said, "But I am unable to agree that as to the outside world—including the Legislature—it places the vendee in the position of the holder of a freehold estate, legal or equitable(*i*)."

"These authorities, in my opinion, strongly show that the interest of the purchaser until he is entitled to call for the conveyance is properly an equity, or equitable right, rather than an equitable estate(*j*)."

In a proceeding to determine whether an agreement for the sale of a business including property, real and personal and the good will, required a stamp under an Act imposing a duty on every [illegible]nveyance or transfer on sale," which term included [illegible]y instrument whereby any property is "legally or equitably transferred to or vested in the purchaser," it was held that it did not. Ha[illegible]s, J., said: "I can understand, then, it might be fairly said that under the agreement, coupled with the fulfilment of all the conditions precedent, and on the payment of the purchase money, an equitable interest might be transferred to the vendee. . . I have already stated that, in our judgment, the agreement does not operate as a transfer, either legally or equitably, of the property comprised therein, although no doubt it would confer upon the purchaser a right legally and equitably to have such a conveyance made, in the event

(*i*) *Per* Hagarty, C.J.O., *Re Flatt & Prescott*, 18 App. R. at p. 8; see *Sawers* v. *Toronto*, 2 O.L.R. 717, where it was held that a purchaser after payment of a portion of his purchase money, and before conveyance, was held liable for taxes as owner.

(*j*) *Per* Osler, J.A., Ibid. at p. 17. See *York* v. *Osgoode*, 21 App. R. 168; 24 S.C.R. 282, where "owner" means actual owner, not occupant, for the purposes of the Ditches and Watercourses Act, R.S.O. c. 220.

of all the conditions precedent being fulfilled on the day, or before the day, on which the conveyance was to be finally settled(*k*)."

(ii) *Cases in Favour of Theory of Estate.*

On the other hand, there is a distinct theory of an estate in the purchaser, to be derived from *dicta* just as emphatic as those already cited. The most concise statement is to be found in a speech of Lord Westbury's in *Rose* v. *Watson*(*l*).

"When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate."

In the same case(*m*), Lord Cranworth takes the position that since when the purchase money is paid, the vendor becomes a trustee for the purchaser, it follows, as a corollary to this proposition, that where part of the purchase money is paid, the vendor becomes a trustee for the purchaser "to the extent to which he has paid his purchase money," and ends by saying "in other words, that he acquires a lien exactly in the same way as if after the payment of part of the purchase money the vendor had created a mortgage to him of the estate to that extent."

Lord Cairns, in *Shaw* v. *Foster*(*n*), said: "Under these

(*k*) *Commissioners of Inland Revenue* v. *Angus*, 23 Q.B.D. at pp. 583, 585.

(*l*) 10 H.L.C. at p. 678.

(*m*) At p. 683.

(*n*) L.R. 5 H.L. at p. 338.

circumstances I apprehend there cannot be the slightest doubt of the relationship subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." In the same case, Lord O'Hagan said(*o*), "By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase money. . . This I take to be rudimental doctrine, although it generally is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee."

James, L.J., in *Rayner* v. *Preston*(*p*), said, "That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser, and that, in my opinion, is the correct definition of a trust estate, wherein that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*."

(*o*) At p. 349.
(*p*) 18 Ch. D. at p. 13.

Sir Geo. Jessel, M.R., speaks of the doctrine as having been that of the Courts of Equity for two hundred years, and proceeds, "What is that doctrine? It is that the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain the possession of the estate until the purchase money is paid(*q*)."

In another aspect the relationship is taken for granted. Thus, where a purchaser has been let into possession, he has been held to be a *cestui que trust* under an implied trust in order to bring him within section 5, sub-section 8, of *The Real Property Limitation Act*, which enacts that no *cestui que trust* shall be deemed to be a tenant at will within the meaning of that Act(*r*).

(iii) *Deductions From the Cases.*

We have quoted thus at large, for the purpose of showing the great variety of opinion, and for the purpose of ascertaining whether there is any clear, unequivocal and unqualified statement that the purchaser has for all purposes an equitable estate in the land(*s*).

The result is that the following statements may be extracted from the cases:—

The vendor is a trustee *sub modo* only;

He is in progress towards being a trustee;

He is called a trustee by metaphor only, and an improper use of the term;

(*q*) *Lysaght* v. *Edwards*, 2 Ch. D. at p. 506.

(*r*) *Warren* v. *Murray*, L.R. (1894) 2 Q.B. 648; *Irvine* v. *Macaulay*, 24 App. R. 446; *Building and Loan Association* v. *Poaps*, 27 Ont. R. 470.

(*s*) The effect of such cases as *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Lowther* v. *Heaver*, 41 Ch. D. 248, has not been overlooked; but they do not alter the situation: See *Manchester Breweries Co.* v. *Coombs*, L.R. (1901) 2 Ch. at p. 617.

He becomes a trustee *pro tanto* as portions of the purchase money are paid;

He becomes a trustee when all the money is paid, and not before;

He is a trustee only to the extent of his obligation to perform the agreement;

The beneficial ownership passes to the purchaser at once upon signing the contract;

The purchaser has but an equitable right, not an estate;

The ownership is, in equity, transferred to the purchaser; the same, but only to the extent of the money paid; the same, but so as to give the purchaser a lien or mortgage for his purchase money paid;

The vendor is a constructive trustee;

The rule applies only as between the parties, and not as regards third parties, or the Legislature;

The rule applies as to the vendor, subject to his right to protect his own beneficial interest;

The vendor becomes a trustee by relation back when the purchase money is paid;

The vendor does not become a trustee by relation back, because that would make him accountable for intermediate rents.

(iv) *Argument Against Theory of Estate.*

Out of this bewildering maze of definitions of the purchaser's interest, it is hardly possible to extract the definite proposition that the purchaser has from the time of signing the contract "an estate of inheritance in fee simple," and at the same time it is not possible in face of them to deny that he has a very substantial interest in the land, unless we can advance some convincing argument against it. And to this we must now apply ourselves. It is first to be noticed that all the opinions in favour of an equitable estate are

qualified. Lord Westbury completely destroys his own opinion in *Rose* v. *Watson*, that the ownership is in equity transferred by the contract, by his statement in *Knox* v. *Gye*, eight years afterwards, that the vendor is a trustee only by metaphor, and an improper use of the term, and that nothing is so misleading as a metaphor. And the strongest opinions in favour of the theory of an equitable estate, dwindle down to an opinion that the purchaser has an interest in the land to the extent of his purchase money paid, or to give him a lien on the land.

All will undoubtedly agree that the purchaser has the right of disposing of his interest in equity by will(*t*), and of alienating and charging it(*u*). But it is not necessary that the interest should be an estate for that purpose.

Assume for the sake of argument that the purchaser may be called in equity the beneficial owner in order to ascertain what is the nature and extent of his ownership. Assume also, that which is undoubtedly the law, namely, that the vendor has the right to possession, rents and profits, until completion of the contract. Now it is clear beyond peradventure that while the vendor holds the legal estate, and the contract is *in fieri*, he has also the really beneficial interest, the profitable interest, a beneficial estate in fee simple, which he is entitled to enjoy until the purchaser performs his part of the contract; and if he never performs it, which the vendor will enjoy forever. If that is so, and it is clear beyond question, it is difficult to see how there can be another concurrent beneficial estate in fee simple in the purchaser. In order to work out the equitable theory, there must be predicated of the land that there is in the vendor a legal estate in fee, and a profitable, substantial, beneficial estate or interest, and concurrently in the purchaser an interest in fee, called beneficial, not profitable, and existing only in contemplation of equity. But

(*t*) *Wall* v. *Bright*, 1 J. & W. at p. 500.

(*u*) *Shaw* v. *Foster*, L.R. 5 H.L. at pp. 338, 350.

there cannot be two concurrent equitable estates in fee simple in the same land.

Again, if the purchaser were really a beneficial owner, he would be entitled to some, at any rate, of the rights of a *cestui que trust*. But there is not a single act of ownership which he is able to exercise over the land. All is conditional upon his performing his part of the bargain. Even if he pays part of his purchase money he does not (with all deference) acquire a partial ownership, for if he attempted to ask for partition on the ground that he was joint equitable owner with the vendor, he would meet with no favourable response. Indeed, the actual result of all the decisions is that he has but a lien on the land for purchase money paid, which is a very different thing from ownership, and of itself predicates ownership in another; and a choice of remedies if the vendor refuse to convey, one of which is an equitable right to compel a conveyance on his performing his part.

Again, the opinions in favour of an estate are all qualified by the statement that it is only in the eye of a Court of Equity that the ownership exists. But even here, if we examine the grounds upon which equity proceeds in specific performance cases, we shall see that the opinion cannot be maintained. Lindley, L.J., in a case already cited(*v*), said, "Even a judgment for specific performance does not transfer the property to the purchaser. This is obvious enough if we consider the jurisdiction of the court to decree the specific performance of an agreement for the purchase of land situate in a foreign country. Ever since *Penn* v. *Lord Baltimore* (1 Ves. Sen. 444), the Court of Chancery has exercised that jurisdiction. But why? Because it did not affect or profess to affect by its decree the property itself; it acted only *in personam* and compelled the vendor to do

(*v*) *Commissioners of Inland Revenue* v. *Angus*, 23 Q.B.D. at p. 596.

whatever was necessary to be done, either in this country or abroad, to transfer the property to the purchaser." And this is strongly emphasized by the inability of the court to grant specific performance at all where the vendor is a person not subject to the jurisdiction of the court, *e.g.*, a foreign Sovereign or government, in which cases the court will not even proceed against the property of such government, which is within its jurisdiction(*w*).

If one may use the term, where so many eminent judges have spoken, it seems that confusion has resulted from treating one of the purchaser's *remedies* as his right or interest. It is on all hands admitted that it is in equity only that this so-called beneficial ownership exists. But that can only be when equity is appealed to. Any person so appealing to a court for *equitable relief* can have it. But if the purchaser, on the refusal of the vendor to carry out his contract, were not to appeal to equity, could it be said that he was equitable owner of the estate. Upon a vendor's refusal to complete, the purchaser has a choice of several remedies. He may sue at law for breach of contract; he may sue to recover his deposit simply, treating the contract as rescinded by the vendor; he may ask for specific performance. In the first two instances he has no estate; in the last he may claim to be equitable owner. So that it all depends upon the accident of the purchaser's seeking equitable relief. And even there equity acts, not *in rem*, but *in personam*. And it is impossible to conceive that, in the case of land in a foreign country, it could ever be held that any interest in the land passed, even in the eye of a Court of Equity; so, equity acting on precisely the same principle when the land is at home, it is impossible to conceive that the equitable fee is in the purchaser before payment of his purchase money and performance of all his conditions.

(*w*) See the note to *Penn* v. *Lord Baltimore*, 1 Wh. & T. Lg. Cas. 7th ed. at p. 779.

This is the conclusion arrived at by Mr. Hayes(*x*). After very forcible reasoning against the theory of an equitable estate, he concludes as follows(*y*):—"The essential nature of an equity has not changed, it remains at this day, what it always was, neither *jus in re* nor *jus ad rem*, but a mere right against the person, to be enforced by subpœna, though in modern times additional powers have been imparted by the Legislature for enabling Courts of Equity, in certain cases, to communicate a legal title(*z*)."

The result is that we conceive this interest of a purchaser, this equitable right, not to have been affected by the enactment, but that the rule remains as before. It is thus laid down by Lord Justice Fry(*a*):—"If the purchaser of realty die before completion, the contract may be enforced either by or against the vendor, or the heir or devisee of the purchaser; the personal representative being a party as having an interest in disputing the contract and as being the hand to pay the purchase money(*b*); and the heir or devisee of the purchaser being a party as being the person entitled to have the estate conveyed to him, and to insist on a proper inquiry into the title(*c*)."

The case of *Re Williams & McKinnon*(*d*) is not inconsistent with this rule. There, an application was made to appoint an administrator *ad litem*, in order that the vendor might bring an action to rescind a contract to purchase land. Nothing is shown as to the intended constitution of the action.

(*x*) 1 Conv. at pp. 96 *et seq.*

(*y*) At p. 99.

(*z*) An instance of this in our provincial legislation is the power to vest property where a conveyance could be ordered: R.S.O. c. 51, s. 36.

(*a*) Fry, Sp. Pfce., 3rd ed. s. 217.

(*b*) *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Ves. 456, where the residuary legatees were made parties; and see *Holt* v. *Holt*, 2 Vern. 322; *Bradfield* v. *Scriven*, 22 W.R. 202.

(*c*) *Townsend* v. *Campernowne*, 9 Pri. 130.

(*d*) 14 P.R. 338.

But when the purchaser has paid all his purchase money and complied with the terms of the contract, the vendor then stands seised in trust for the purchaser, and the latter undoubtedly has an equitable estate in fee simple.

2. *Options.*

If a purchaser's interest under a contract be not within the Act, much less would an option to purchase, which is only the right to accept an offer. But the subject may be independently examined, as there are some authorities upon it.

(i) *Decision That Option Passes an Interest.*

In order to ascertain whether an option to buy land is within *The Devolution of Estates Act,* the exact import of such a right or interest must be determined.

In *London and S. W. R. Co.* v. *Gomm*(*e*), Sir Geo. Jessel, M.R., said, "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising this option has to do two things; he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

(ii) *Contrary Decisions.*

Speaking with deference to so great an authority, it may safely be said that this is too wide a definition of an option —a mere right to choose to enter into a contract—and leaves no distinction between an option and a contract, or, indeed,

(*e*) 20 Ch. D. 562, at p. 581.

between an option and a completed purchase, if the vendor's "estate or interest is taken away from him." In another case, where a land owner agreed to give to another the "first refusal" of a piece of land upon certain conditions, it was held that this did not give an interest in land(*f*). There is no substantial difference between these cases, the difference between exercising an option to buy and a refusal to buy being a mere difference in expression of the same idea, *viz.*, that the favoured person is to have the choice or option to buy, if he pleases, which connotes the refusal to buy if he does not please to do so. For our present purposes it might be sufficient, as already suggested, to say that, even if an option were the equivalent of a contract, yet, having arrived at the conclusion that a purchaser's interest under a contract is not within the statute, so neither is an option within it.

But it appears that an option is something entirely distinct from a contract. The latter imports a legal obligation to buy, and if there is no legal obligation to buy, where an option only is held, then there is not only no agreement, but no obligation upon the person holding the option even to make an agreement(*g*); and, if no agreement, no property, and no liability to answer in damages or otherwise a refusal to buy. As long as it rests with the person holding the option to say whether or not he will buy, there cannot be said to be any contract until he exercises the option and renders himself liable as a contractor. Not only is that the view taken by the House of Lords as to the position of the person holding the option, but Lord Watson treats the owner's proposition, when he gives the option, as not being, in the sense of law, an agreement by him to sell, although

(*f*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* L.R. (1901) 2 Ch. 37.

(*g*) *Nevitt* v. *McMurray*, 14 App. R. 126

the offer to sell would be converted into an agreement upon exercise of his right by the person holding the option(*h*).

An option being, then, a mere offer of sale made to a person, and being kept open pending the election of the person to whom it is made, by a contract to do so, it cannot be accepted by any person to whom it is not made. It may accompany an interest in land otherwise created (as by a lease with an option to buy the fee), or it may stand alone (as by a mere offer to sell). In either instance it seems to be a personal right, not giving the person holding it an interest in the land transmissible by descent, but rather the right to acquire an interest therein.

In *Re Adams & New Kensington Vestry* (*i*), the nature of an option was discussed at some length, the point in question being whether the administrator or the heir at law of a lessee, to whom an option was given to purchase the fee, could exercise the option. In that case there was a lease to one Adams, which contained a covenant that if the said Adams, his *executors, administrators,* or assigns should be minded to purchase the fee, the lessor would on notice, etc., convey the fee to the said Adams, his *heirs and assigns.* Adams died intestate, and his son, being heir at law, took out letters of administration and exercised the option, and received a conveyance of the fee. On a contract by him to sell, it was objected that he had exercised the option as administrator and not as heir, and must therefore procure the concurrence of the next of kin, and so the Court of Appeal held.

The Court said that their decision must turn upon the terms of the particular covenant, and that it was only in the character of administrator that the offer could be accepted, the assigns mentioned in the covenant being the assigns of the lease. The contract in that case provided

(*h*) *Helby* v. *Matthews*, L.R. (1895) A.C. 471.
(*i*) 27 Ch. D. 394.

that if the lessee did not exercise the option, his executors, administrators or assigns might do so. The covenant to convey to the heirs and assigns, upon exercise of the option, only meant that the covenantor would convey in fee to the person exercising the option. It appears from this case that the wording of the particular option in each case is important, and that only the person named can accept.

In *Green* v. *Low*(*j*), there was an agreement for a lease, and also a covenant that the landlord would convey the fee to the lessee. The lessee forfeited his term, and the Court held that the covenant to convey was independent of the lease and exercisable notwithstanding the forfeiture.

In *Henrihan* v. *Gallagher*(*k*), the Court of Error and Appeal held that the heir at law of a lessee with an option to purchase the fee and not his administratrix, was the person to exercise the option, but there is nothing in the report to show what were the exact terms of the option. This case, therefore, is not inconsistent with *Re Adams & Kensington,* for the option may have been given to the heirs of the lessee but it is of little value for want of some indication as to whether the executors or heirs were mentioned in the option.

Adopting the principle of *Re Adams & Kensington,* that the persons mentioned in the option are the persons to exercise it, there is no question of devolution at all. If executors are named they exercise their right as persons named in the option. If heirs, then the heirs would exercise it. If no one is named except the person to whom the option is given, it would seem to be a correct inference that there is no estate or interest in him if he does not exercise the option in his lifetime; and therefore he has no interest in the land to transmit to any one.

(*j*) 22 Beav. 625.
(*k*) 9 Gr. 488; 2 E. & A. 338.

3. *Determinable Fees.*

An estate in fee may be directly limited to determine on a future event, which must be of such a kind that by possibility it may never happen; or as long as an existing state of things shall endure, and these are determinable fees(*l*). By possibility it may endure forever, and thus it is a fee; but by the qualification annexed it may come to an end by the happening of the event, and so is not simple but qualified and determinable. They are "divisible into two classes, according as the future event which may determine them (1) is an event which admits of *becoming impossible to happen*; such as the marriage of C.D., which may become impossible by C.D.'s death; or (2) is an event which must *forever*, if it does not actually happen, remain *liable to happen*, such as the fall of a particular building. In the former case, if the event has not happened before the death of C.D., the determinable fee is by his death *ipso facto* enlarged into a fee simple. In the latter case the determinable fee can never be enlarged into a fee simple, except by a release of the possibility of reverter"(*m*).

Thus if a grant be made to A. and his heirs until he marry, it being uncertain whether he will ever marry, the estate may last forever, and if he does not marry, the estate becomes absolute, or is enlarged into a fee simple(*n*), and in such a case would, no doubt, be treated for purposes of succession as a fee simple.

A limitation to A. and his heirs, so long as B shall have heirs of his body, creates a fee determinable by the failure of issue of B. It may endure forever, but it is a fee determinable, and therefore not a fee simple. It is, by direct limitation, somewhat like a base fee under the disentail-

(*l*) Challis, R.P. 2nd ed. 224, 225.

(*m*) Ibid. p. 227, and see the examples given p. 228.

(*n*) See and cf. *Re Howard*, L.R. (1901) 1 Ch. 412, and cases cited.

ing Act. But there is this difference, that there is a reversion or remainder expectant on a base fee under the disentailing Act, while no reversion exists after a direct limitation as above, but only a possibility of reverter. The whole property in the land passes, and at common law no other estate could be limited over afterwards; but the estate remains a determinable fee, with a possibility of reverter to the grantor and his heirs on its determination. Though there is no reversion expectant upon a determinable fee, yet by conveyance operating under the Statute of Uses, or by executory devise, a fee may be limited to take effect after a determinable fee.

A determinable fee is called a base or qualified fee by Blackstone(*o*), being "such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end." But the expression determinable fee is used by Preston and adopted by Challis(*p*).

These estates are distinguishable from estates in fee simple, which are pure, absolute and free from qualifications and conditions(*q*). Preston says(*r*), "An absolute estate is an interest not subject to any qualification or collateral determination by which it may be determined, or condition by which it may be defeated. . . . An absolute estate depends wholly on the words of direct limitation. The epithet *absolute* is used to distinguish an estate extended to any given time, without any condition to defeat, or collateral limitation to determine the estate in the meantime, from an estate subject to a condition or collateral limitation. The term absolute is of the same signification

(*o*) 2 Comm. 109.

(*p*) Challis R.P. 2nd ed. 228.

(*q*) Coke says "the more genuine and apt division is to divide fee, that is inheritance, into three parts, that is, simple or absolute, conditional, and qualified or base": 1 Inst. 1 a.

(*r*) Citing 7 Rep. 25.

with the word pure or *simple*—a word which expresses that the estate is not determinable by any event besides the event marked by the clause of limitation. . . An estate to a man and his heirs forever, generally, is a simple, pure and absolute estate. . . In this sense, an estate which is absolute differs from a *determinable* estate, which, according to the express terms of the limitation thereof, when it is first taken, or the construction of law on the nature of the estate after it is created, may determine, by some event, before the period shall be completed through which it is extended, and during which it may continue. An estate to A. and his heirs, tenants of the Manor of Dale, is a determinable estate. Though in point of duration and extent of time, the right of holding this land, in virtue of the limitation to the heirs, may continue forever, the estate which passes by this limitation is subject to be determined by the event marked by the words of qualification"(*s*).

Such estates as these, then, cannot be included in the expression "Estates of inheritance in fee simple," and consequently are not within the enactment.

It has always been assumed in practice that the Statute of Victoria respecting descent applies to all inheritable interests. But its limitations are narrow. Descent is traced from the person who "dies seised in fee simple. . . of real estate" (*t*). "Real estate" is defined to mean "every estate, interest and right, legal and equitable, held in fee simple." These words, equally with those used in *The Devolution of Estates Act*, fail to include determinable fees, which are not fees simple. And if this is a correct interpretation of this legislation, then determinable fees descend according to the rules of the common law as modified by the Statute of William IV., which expressly includes within its provisions all estates transmissible to heirs.

(*s*) And see Ibid. 466.
(*t*) R.S.O. c. 127, s. 41.

4. *Base Fees.*

Though a determinable or qualified fee was at common law sometimes called a base fee, this term is more usually applied to that interest which is created by a disposition by tenant in tail, under the disentailing Act, where there is a protector of the settlement, and his consent has not been obtained. The effect of such a disposition is to create a quasi fee simple. To all appearances it is a fee simple, but as the reversion in fee is in the settlor or his heirs, expectant upon the failure of issue of the tenant in tail, it plainly cannot be a fee simple. By possibility it may last forever, for the issue in tail may never come to an end. But its duration is strictly measured by the existence of the issue in tail, and when they end the estate determines. It is in fact a determinable fee, but it differs from such a fee created by direct limitation in this, that there is a reversion in fee simple expectant on it.

Being in no way an estate in fee simple, it is not within either *The Devolution of Estates Act* or the Inheritance Act, and therefore must descend as at common law, as modified by the Statute of William IV.

5. *Contingent Remainders.*

If contingent remainders are properly described as "estates" then such as stand limited in fee will fall within the enactment; but if not, then they are not affected by it, but are left to devolve under the prior law.

It is a habit which is almost universal to speak of all interests in land as estates. The best conveyancers use the term, and divide estates into estates vested and contingent. Fearne so classifies them, and under the head of contingent estates, places contingent remainders(*u*). Preston also divides estates into vested and contingent(*v*). But when

(*u*) Fearne, Con. Rem. 1.

(*v*) 1 Preston on Estates, 61.

the nature of a contingent remainder has to be examined it will be found that it is not an estate, but rather a possibility or chance of getting an estate, and is more properly described as an interest.

At common law there were but two estates in land strictly speaking, an estate in fee simple and an estate for life. There were some varieties of fees, such as determinable fees, conditional fees and qualified or base fees. The life estate is less susceptible of variation, and is measured either by the grantee's life or the life of another. "The above mentioned estates are the only estates known to the common law"(*w*). Estates tail were not known until after the statute *De donis*, and arose out of that statute. Estates for years were not originally estates, but their present dignity is said to be due to a statute of Henry VIII. (*x*).

When the statute of *Quia emptores* was passed, whereby estates were made alienable, it applied to estates in fee simple only.

Mr. Joshua Williams was of opinion that contingent remainders were originally illegal(*y*). Whether that is correct or not, it seems inconsistent with what we know of the feudal system that an estate without an owner should have been possible; and that occurs where a remainder is limited to a person not *in esse*, or not ascertained, when the conveyance is made or the remainder is created. Certain it is that a contingent remainder must be preceded by a freehold estate in order that the seisin of the freehold should be in some one. For a contingent remainder not being vested either in interest or possession, there would be no one seised of the freehold if the preceding estate were not a freehold. And if there is no vesting in interest, either because the person to take the interest is not *in esse*, or the event upon which alone he can take it has not happened, it

(*w*) Challis, R.P. 2nd ed. 50.
(*x*) Challis, R.P. 2nd ed. 50.
(*y*) Williams, R.P. 19th ed. 346.

is difficult to see how a contingent remainder can be an estate. Indeed, as we have said, the same conveyancers who for the purpose of classification speak of contingent remainders as estates, when they come to examine their characteristics treat them as interests only. Thus Preston says(*z*): "Every estate, more accurately, every interest was either vested or contingent." And at a later page(*a*) he says, "A contingent interest does not give any certain nor any immediate right, or any estate in the land; it gives a mere possibility." And again, "Strictly speaking, there cannot be a contingent estate. There may be a contingent interest; but no interest, except such as is vested, is accurately termed an estate"(*b*). Mr. Joshua Williams says(*c*): "A contingent remainder is no estate; it is merely a chance of having one; and the reason why it so long remained inalienable at law was simply because it had never been thought worth while to make it alienable." And Mr. Challis, in dealing with merger of estates, points out that the interposition of a contingent remainder between two vested estates, which would otherwise merge, will not prevent merger. "A contingent remainder, not being in the eye of the common law an estate, but only a possibility to have an estate at a future time upon the happening of a contingency, did not suffice to prevent merger, if interposed between two vested estates, which were otherwise such that the one would merge in the other"(*d*).

If we assume now that the Legislature intended to be accurate in describing the estates to which *The Devolution of Estates Act* should be applicable, we must exclude from its operation all contingent interests. Comparing this en-

(*z*) 1 Preston on Estates, 61.
(*a*) P. 75; see also p. 88.
(*b*) 2 Preston on Abstracts, 92.
(*c*) Williams R.P. 19th ed. 359.
(*d*) Challis, R.P. 2nd ed. 76; and see *Egerton* v. *Massey*, 3 C.B. N.S. 338.

actment with others, we are confirmed in this view. Contingent interests were not assignable at law. They were revived, and first made assignable in 1851(*e*), after having been abolished two years before by an Act(*f*), which the later Act repealed. And in the enactment by which they are made assignable they are described as "interests," and classed with other interests of an executory character. "A contingent, an executory and a future *interest*, and a possibility, coupled with an interest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon land, may be disposed of by deed"(*g*).

By *The Wills Act* before 1874, "Estates, possibilities, rights, titles and interests" were made devisable, whether they are "in possession, reversion, remainder or contingency"(*h*); and since that date the power to devise is extended to "all contingent, executory or other future interests in any real or personal estate"(*i*). Not only is it noticeable that the Legislature adheres to the expression "contingent interests," but also that the interests that may be devised are carefully referred to in a comparatively long detailed list, which is in striking contrast with the narrow restrictions of *The Devolution of Estates Act*. Again, the Act, as at present consolidated, contains the original Devolution of Estates Act, and the Statutes of William IV. and Victoria on descent. And taking the whole now as one Act, we find the same striking contrast between the various interpretation clauses. Thus the Statute of William IV. makes "land" include hereditaments, corporeal and incorporeal, money to be laid out in the purchase of land, chat-

(*e*) 14 & 15 V. c. 7, s. 5.
(*f*) 12 V. c. 71, s. 8.
(*g*) R.S.O. c. 119, s. 8.
(*h*) R.S.O. c. 128, s. 2.
(*i*) Ibid. s. 10.

tels and other personal property transmissible to heirs, possibilities, rights of entry and action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency (*j*).

The Statute of Victoria makes "real estate" include "every estate, interest and right, legal and equitable, held in fee simple or for the life of another" (*k*).

It seems clear beyond doubt then, that when the same Act confines the provisions as to succession of the personal representatives to "estates of inheritance in fee simple, and all estates held by the deceased for the life of another," it should be taken to have intentionally restricted the application to such estates as are strictly and technically within that definition; and that possibilities and contingent interests being expressly mentioned in other clauses of the Act should pass thereunder and not go to the personal representative.

6. *Executory and Future Interests.*

All contingent interests are executory, and in this sense executory interests would include contingent interests. "The difference, to bring it to a point," says Preston (*l*), "is, that *all executory interests are not contingent*, and *all contingent interests are executory*. For this reason it is necessary to distinguish between those interests which are *executory* and *not contingent*, and those interests which are *contingent*, and necessarily *executory*."

Bearing this distinction in mind, the term will here be used as more properly applicable to future interests, which arise by means of conveyances operating under the Statute

(*j*) R.S.O. c. 127, s. 21, s.-s. 1.
(*k*) Ibid. s. 38, s.-s. 1.
(*l*) 1 Preston on Estates, 63.

of Uses, or under wills. "The fact that the ingenuity of conveyancers operating upon the Statute of Wills and the Statute of Uses, has devised other prospective possibilities, unknown to the common law, as interests to arise at a future time, which are not estates, but which will be estates when they arise, makes it necessary to distinguish executory interests from contingent remainders(*m*)."

In Butler's note to Fearne's division of estates into vested and contingent, it is said that, while it might be inferred that Mr. Fearne considered that under a conditional limitation or executory devise, the *cestui que use*, or the devisee took a vested *estate*, while the uncertain event was in suspense, yet the fee simple being in the person from whom the land moves or his heirs awaiting the event, the person taking under the conditional limitation or executory devise cannot, while the suspense continues, have in the proper sense of that word an *estate*. Thus A. grants to B. and his heirs, to the use of C. and his heirs, from 1st January next. The fee remains in A. awaiting the arrival of 1st January. Meantime, while awaiting the arrival of 1st January, C. has not an estate in possession, for he has no right to present enjoyment; he has no remainder for the existing estate is a fee simple; he has not a contingent interest, as he is in being and ascertained, and the event is certain to happen; and he has not a vested estate as the fee is in A. He has, therefore, no estate, but the certainty of getting one. So, also, if a devise be made to A. to take effect from and after a certain event, the fee, awaiting the event, will descend to the testator's heir at law(*n*), and in the interval A. has nothing but the certainty of getting an estate.

In cases of this kind the element of uncertainty or contingency is not necessarily present, and when not present,

(*m*) Challis, R.P. 2nd ed. 57, 58.

(*n*) See *Egerton* v. *Massey*, 3 C.B.N.S. at p. 358, *per* Williams, J.

the interests are not contingent, though they are executory. In such cases therefore, the expectant person has not an estate. The limitations are executory, and confer a certain fixed right to an estate in possession at a future period, but no present estate(*o*).

This may be further illustrated by the ability and common practice, either under the Statute of Uses, or by executory devise, to limit a fee simple after and in defeasance of a fee simple. Thus, if land be devised to A. and his heirs, but if he die under twenty-one, then to B. and his heirs, the devise to B. is good as an executory devise, though the same interest would have been void if attempted to be created by a conveyance operating at common law. Here B. cannot have an estate, for the whole fee is in A., subject to being divested if he die under twenty-one.

Similarly, by a conveyance operating under the Statute of Uses, if a grant be made to A. and his heirs to the use of B. and his heirs until C. return from abroad, and from and after the return of C. to the use of C. and his heirs, here C. has no estate until he returns, the fee being in B. But when he returns the use shifts into C., and he becomes tenant in fee simple. For the purpose of our enquiry this familiar instance of an executory interest is unsuitable, because C.'s death before returning would render the event impossible. But if the estate were limited to C. and his heirs as soon as D. should return from abroad, and before D.'s return C. should die, his interest while the suspense lasted would be executory only, and not an estate.

The benefit of an executory limitation, which thus purports to create a future interest of the quantum of a fee, was descendible at common law in a regular course of descent, as soon as the person was ascertained in whom it would vest, where the person was uncertain(*p*); and executory devises

(*o*) Fearne, Cont. Rem. 2.
(*p*) Watkins on Descent, 13.

and possibilities were devisable(*q*). By the Statute of William IV. all interests capable of being inherited were subjected to the new rules of descent; and by the Wills Act they are made devisable. They are not mentioned by name in that part of the enactment which was formerly the Inheritance Act, but they might, by a generous interpretation be included in the expression "every interest and right held in fee simple."

The express mention of these interests in these enactments, and their very noticeable omission from *The Devolution of Estates Act*, emphasizes the conclusion that they are not affected by the latter enactment, but must still descend as formerly.

7. *Possibilities.*

Three kinds of possibilities are said by Challis to exist(*r*):—

(1) Possibilities coupled with an interest, as contingent remainders and executory interests; which, so soon as the person in whom they will vest, if they do vest, is ascertained, are both descendible and devisable(*s*).

(2) Bare possibilities, as the possibility of reverter on the breach of a condition, and the possibility of reverter upon a common law fee other than a fee simple; these at common law are descendible but not devisable(*t*).

(3) Absolutely bare possibilities, or mere expectations of possible benefits, not founded upon the dispositions or provisions of any operative assurance. These at common law are neither descendible nor devisable; though the succession of children by representation in heirship often did, so far as the expectations of heirs are concerned, amount

(*q*) *Jones* v. *Roe*, 3 T.R. 88.

(*r*) Challis, R.P. 2nd ed. 66, note.

(*s*) An executory devise is a possibility coupled with an interest: *Jones* v. *Roe*, 3 T.R. 88.

(*t*) See also Challis, p. 73.

practically to the same thing. But in strictness, they did not *succeed to the expectation,* but to the heirship upon which it was founded. Such possibilities of devisees, if children of the testator, are practically made sometimes descendible by the Wills Act, 7 Wm. IV. and 1 Vict. c. 26, s. 33(*u*).

Of possibilities coupled with an interest we have sufficiently dealt, in treating of contingent remainders and executory interests. And as any other possibility coupled with an interest, if any such exist, must be of a still more slender nature, they may be the more readily dismissed as not being estates.

Possibility of reverter upon breach of a condition will be dealt with under rights of entry for breach of condition.

The possibility of reverter upon a determinable fee is clearly not an estate. For, as we have seen, there is no reversion left after a determinable fee is granted.

Possibilities (by which are probably meant bare possibilities(*v*)), are expressly mentioned in the Statute of William IV., but not in the Inheritance Act. They could hardly fall under the denomination of a "right held in fee simple," which is the expression used in the latter enactment, for they do not rise to the dignity of a right. The possibility of reverter on breach of a condition is no right, but the mere expectation that a right will arise on breach of the condition. And a possibility of reverter on a determinable fee is, similarly, an expectation of a right to arise on the determination of the fee. If that interpretation is correct, then such possibilities descend under the rules of the common law as modified by the Statute of William IV., and may be devised, but do not pass under *The Devolution of Estates Act.*

(*u*) R.S.O. c. 128, s. 36.

(*v*) By contrast with "possibilities coupled with an intesest" in R.S.O. c. 119, s. 8, which are there made assignable.

There are some possibilities that do not from their nature enter into this discussion. Thus on a gift to the survivor of several, each has a possibility, but his death, leaving the others, ends it. So with a devise to one upon attaining a given age, or to the children living at a given period.

The expectancy of an heir at law was also a possibility, but, for obvious reasons, it does not concern us now.

There is another kind of possibility, however, which arises out of the Wills Act. Where any child or other issue of a testator, to whom any real estate is devised for any estate not determinable at or before the death of such child or other issue, dies in the testator's lifetime, leaving issue, and any of the issue of such person are living at the death of the testator, the devise takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will(*w*), This section was passed to prevent a lapse; and the devisee who has such a possibility may devise it(*x*), and it will pass by his will as if he had died after his testator, though he may, in fact, die before, provided that he leave issue. Thus, if a testator devise land in fee simple to A., his son, and A. die in the testator's lifetime, having made a will leaving all his estate to his son, who survives the testator; the will of the testator is to take effect as if A., his son, had died after him. Is the interest which passes by his will "an estate of inheritance in fee simple?" Though the son A., has but a possibility, or *spes successionis* during his lifetime, and even after his death, until the testator in fact dies in the lifetime of some descendant, yet the circumstances are to be taken as if the son had survived his testator. This is so severely so, that estate duty is charged as if the survival were a fact instead of a fiction. The special enquiry now before us restricts the consideration of the subject to the

(*w*) R.S.O. c. 128, s. 36.

(*x*) See *Re Scott*, L.R. (1901) 1 Q.B. 228, where in such a case estate duty was levied.

moment of the death of the expectant devisee. At that moment he has nothing but an expectation. His heir or devisee has nothing but an expectation, viz., that he will outlive the first testator. Can such an interest be said to be an estate? It is impossible to say that it is. It is no more than a possibility.

There is still another possibility, or, perhaps, it might be denominated an executory or future interest, which arises out of The Devolution of Estates Act itself, which is not within the Act. Thus, upon the death of a beneficiary within the year (now three years) after the owner's death, he has only a chance of succeeding to the land, or a right to sue for a share after payment of debts(*y*). The personal representative is clothed with the whole legal and beneficial estates in fee simple. It is true that the concurrence of heirs or the official guardian is necessary to a conveyance, but the whole estate is in the personal representative. If he requires to sell in order to pay debts or distribute, he may do so, and in that case the beneficiary gets no estate in the land, and in the event never had any, but is entitled to share in the proceeds after payment of debts. But, on the other hand, the personal representative may not require to sell, and in that event the land will shift into the beneficiary, who for the first time has a title to the land itself. This chance of getting the land, depending, as it does, upon his interest not being determined by the action of the personal representative, must be classed with the expectation of an heir to succeed, or with an executory or future interest, or a possibility coupled with an interest. It is not an estate of inheritance in fee simple, for the whole fee is in the personal representative, and, consequently, if a beneficiary were to die before the land vested in him, his interest would not pass under the Act to his personal representative, but would go as land to

(*y*) *Mulcahy* v. *Collins*, 25 Ont. R. at p. 244, *per* Ferguson, J.; *Palmer* v. *Allicock*, 3 Mod. at p. 59.

his heirs, or, if converted into money by the personal representative of the principal estate, to the personal representative of the beneficiary as money(*z*).

8. *Wrongful Seisin.*

The wrongful seisin of a trespasser has always been an inheritable interest, though not a devisable one at common law. Descent, at the common law, was traced from the person last actually seised. And the nature of the seisin made no difference in its inheritable quality. So strict was the rule, that, if a disseisor died seised leaving an heir, the heir was taken to be in *by the law*, and *prima facie* rightfully entitled; and the law having cast the seisin upon him by descent, protected him, and the right of entry of the true owner was taken away, and he had to resort to an action to try the right(*a*).

We have now to consider whether this wrongful seisin inheritable in its nature, is at the present time an estate of inheritance in fee simple within the meaning of the enactment under consideration.

"A disseisor," says Preston (*b*), "is a person who acquires a seisin without any title. A necessary effect of a disseisin is to divest the estate of the former owner, and convert it, at first into a right of entry, and, eventually, by a descent which tolls an entry, or by the Statute of Limitations of 21 James I., which takes away the entry, into a right of action. But the estate of the disseisor, while it remains subject to a right of entry, may be defeated by the entry of the rightful owner; or by the action of such owner, so long as his remedy by entry or action continues; or the estate may be restored to the rightful owner by remitter."

(*z*) Contra, *per* Meredith, J., *Mulcahy* v. *Collins*, 25 Ont. R. at p. 246; but the point was not presented for argument, nor did the case turn upon it.

(*a*) Williams on Seisin, 155.

(*b*) 2 Preston on Abstracts, 388.

And again, "A disseisor is in all other respects to be considered in the same situation as a rightful owner; with the difference, that his title is defeasible by the entry, or, according to circumstances, by the action of the rightful proprietor(*c*)."

Again, Mr. Williams says(*d*), "There is another rule still in existence founded apparently on the same principles, and that rule is that *an estate gained by wrong is always an estate in fee simple* (*e*). If a person wrongfully gets possession of the land of another, he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if a squatter wrongfully encloses a bit of waste land, and builds a hut on it and lives there, he acquires an estate in fee simple by his own wrong in the land which he has enclosed. He is seised and the owner of the waste is disseised. It is true that until by length of time the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains he is not a mere tenant at will, nor for years, nor for life, nor in tail. He has seisin of the freehold to him and his heirs. The rightful owner, meantime, has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised, another person cannot be so."

There is no mistaking the apparently plain meaning of these quotations, but there is no mistaking at the same time that they, as, of course, they must do, recognize that the "rightful owner" still owns the land. Preston describes the disseisor as having an estate "without any title," and "defeasible by the entry" of the rightful owner. Williams, and the citation from Hobart, use the expression as

(*c*) Ibid. 396.

(*d*) Williams on Seisin, 7.

(*e*) Citing Hobart, p. 323: "Wrong is unlimited and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules."

signifying the unlimited nature of the wrong, *i.e.*, a man wrongfully in possession must have an unlimited interest, because the law does not provide limitations for wrongful interests. It is true that both speak of the disseisin as divesting the estate of the rightful owner, and turning it into a right of entry or action. But if the rightful owner succeeds in his entry or action, it must be because he rightfully has the actual estate in fee simple in himself.

Mr. Watkins appears to disapprove of the idea that the disseisor has an estate. He opens his treatise on descent by stating that ancestors from whom hereditaments can be derived by descent are divided into those who have taken by purchase, and those who have themselves succeeded by descent. And, after stating that there are other persons from whom descent may be traced, and lamenting the copying by one writer from another without enquiry, proceeds:—"The rule we are speaking of is thus frequently applied to matters which are absolutely without its view, as it applies only to *the rightful estates of the tenant*, as tenant; or in other terms, it is expressive of the modes by which the law enables him to take such estate. Nor does it, indeed, apply unexceptionably to him. It has nothing to do with disseisins, abatements, etc., which are estates gained by wrong. For where an estate so gained *descends* to the heir of the disseisor, the estate so taken by the heir is *presumed* to be a rightful one until the contrary is shown(*f*)."

And in a note it is said:—"An estate gained by wrong is always a *quasi* fee; for wrong is unlimited and not contained within rules; as if a tenant for life be disseised, the disseisor gains a fee."

When we regard the extreme importance attributed to seisin by the common law, and the restrictions as to assigning causes of action, and compare them with the comparative neglect of seisin at the present day, and the freedom

(*f*) Watkins on Descent, 4th ed. 4.

with which causes of action or rights of entry may be assigned, it is doubtful whether it would be proper at the present day to adhere to the ancient nomenclature, for certainly the consequences of disseisin are not what they formerly were. Livery of seisin, or manual tradition of the land itself, was originally the universal method of conveyance; at present, while it is not abolished, it has practically fallen into disuse. A right of entry at the common law could not be assigned; at present it can, and, in fact, a conveyance of the land itself passes the right of entry on a disseisin(*g*). Descent is no longer traced from the person actually seised. Rights of action (except for condition broken) are assignable. And rights of entry and action are now treated by the modern *Real Property Limitation Act* as the land itself. Mr. Challis, in speaking of terms of years, says that they were not originally estates, being liable to destruction at the will of the reversioner having the freehold, and he says, "An estate which could not, by the common law, be defended at law, seems at common law to have been no estate(*h*)."

Similarly, the seisin of a trespasser could not in any way be defended; he has no title, nothing but seisin.

It may be that the fiction of calling wrongful seisin an estate in fee simple should still be maintained; and undoubtedly as between parties other than the owner it is so treated. Thus, it may be transmitted by will(*i*), or by deed(*j*), and a person claiming under such will or deed will not be allowed to dispute its validity as against any other person also claiming under it, though, as against the true owner, they may both do so(*k*).

(*g*) *Jenkins* v. *Jones*, 9 Q.B.D. 128.

(*h*) Challis, R.P. 2nd ed. 54

(*i*) *Board* v. *Board*, L.R. 9 Q.B. 48; *Anstee* v. *Nelms*, 1 H. & N. at p. 232; *Calder* v. *Alexander*, 16 Times L.R. 294.

(*j*) *Dalton* v. *Fitzgerald*, L.R. (1897) 1 Ch. 440; (1897) 2 Ch. 86.

(*k*) Ibid.

But it does not at all follow that such is a proper description of it in an Act of the Legislature, which in other sections covers this interest by apt and unmistakable words. During the wrongful seisin the true owner undoubtedly has an estate in fee simple in actual reality, and that a rightful estate. The fiction of his having only a right of entry or action must be taken to have disappeared with the introduction of the modern law as to limitations of actions.

Lord St. Leonards thus describes the effect of the modern statute:—"Under the new Act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create estate, although they enabled the party to hold against the world. But the new statute, in point of fact, gives the estate to recover which the remedy is barred, for it bars the remedy and binds the estate(*l*)." The idea of transferring the estate is not quite correct, the statute declaring that, at the expiration of the time for bringing the action, the right and title of the true owner shall be extinguished. But in other respects it is perfectly clear that the true owner is recognized as having an estate, liable to extinguishment; and the trespasser must therefore have bare seisin.

If, however, the disseisor's interest is still to be described as a fee, it must be a wrongful one, and, therefore, purely fictitious. And it is a fair hypothesis that, when the Legislature passed the Act in question, it was dealing with rightful and not wrongful interests and estates, with normal, and not abnormal conditions. If the true owner's interest is only to be described as a right of entry or action, then it is not within the Act, while the disseisor's wrongful fee is. But it is more proper to assume that the Legislature referred to the rightful estate by its proper name.

(*l*) *Incorporated Society* v. *Richards*, 1 Con. & L. 84, 85.

The suggestion made by Mr. Watkins in the note before cited presents a test which the theory of estate will not stand. Thus, if tenant for life be disseised the disseisor "gains a fee." That is to say, his wrong is unlimited; he has not an estate for life; and he must have a *quasi* fee. But he has not got a fee; for the fee is in the remainderman. The latter's estate continues unimpaired, in full vigour, and as much an estate in fee as if it had been freshly created. For his right of entry does not arise until the particular estate is determined. When the disseisor is said to have a fee, then it must be taken that he has a *quasi* fee; an apparent right, unlimited in extent and quality; presumptively an estate until the wrong is shown. Or, to change the expression, as the law provides no rules for wrongful interests, the seisin being unlimited in its nature, must be presumptively infinite, and so resembles a fee simple.

But even if the disseisor's interest is to be called a fee, it is not strictly a fee simple, because it is defeasible or terminable by entry or action. And a defeasible or determinable fee is not a fee simple, absolute and undeterminable. And if a fee determinable, which is a rightful estate, is not within the enactment, *a fortiori* is a fee defeasible or determinable by entry or action, which is a wrongful interest, not within it.

There is no doubt that the true owner is, notwithstanding his disseisin, still entitled to the full legal and equitable estates in the land, and, therefore, there is nothing left for the trespasser but his wrongful seisin. To hold that he is also entitled in fee would be to hold that there can be two fees simple in the land, one in the true owner and another in the trespasser.

Or, to submit the matter to another test. If the executor of a trespasser did not choose to continue the trespass with the hope of some day acquiring a title, could he be called to account, or be sued for a *devastavit*? In other words, would

the court punish him for not committing a wrong by continuing to trespass on another's land. If not, then it would be inconsistent to hold that the wrongful seisin devolved upon him for payment of debts and ultimate distribution.

If wrongful seisin is not within *The Devolution of Estates Act*, how then does it descend? For it undoubtedly is an inheritable interest. In practice it has always been assumed that it descends under the Statute of Victoria to all the children of the disseisor equally. But if it is within the scope of that Act, all of its provisions ought to apply. And a case can easily be suggested which makes it extremely doubtful whether that was intended. Thus, if A., a bachelor, is seised of a piece of land, and dies intestate, leaving a father and brothers or sisters, the land descends to his father for life, reversion to his brothers and sisters(*m*). Now if A. is wrongfully seised, can the wrongful interest go to the father for life? Can it be said that it was intended that such an interest should be the subject of statutory settlement? Could the father claim the "wrongful fee" for life only? And could the true owner, on his death, claim to have a new right of entry? Must not the heir of the deceased disseisor claim in fee if he claim at all(*n*)? This is independent of the question whether, as descent is to be traced from the person who died "entitled" (for so "seised" has been interpreted in this enactment), the disseisor can be said to be entitled at all.

If this be the correct interpretation of these two enactments, then wrongful seisin must descend according to the rules of the common law, as modified by the Statute of William IV.

Such an interest is also devisable, as we have seen. But, as we have also seen, not all devisable interests are within *The Devolution of Estates Act*, and consequently if a dis-

(*m*) R.S.O. c. 127, s. 45.

(*n*) Because wrong "ravens all that can be gotten, and is not governed by terms of the estates."

seisor devised his wrongful seisin, while it would undoubtedly pass under his will, it would apparently not pass to his executors under the Act, not being an estate of inheritance in fee simple.

9. *Rights of Entry for Condition Broken.*

Rights of entry for condition broken have always stood in a different position from rights of entry on disseisin, being of an essentially different character.

They are divided, generally speaking, into two classes:—Rights of entry where there is no reversion; and rights of entry where there is a reversion.

(i) *Where There is No Reversion.*

And first where there is no reversion. The distinction between such a right of entry and a right of entry on a disseisin is apparent at the first glance. The latter is necessarily incident to the estate of the disseisee, for it is a right to recover the estate itself, of which he has wrongfully been deprived. The former is not an incident of an estate at all, where there is no reversion, for it is a right to defeat or determine another's estate, which had been granted on condition, and to re-acquire the land, as of the old estate of the grantor. Thus, where a grant is made on condition, the breach of which may destroy the estate granted, or put an end to it, and entitle the grantor or his heirs to re-enter, the estate may continue forever, for the condition may not be broken, and therefore there is no reversion, but a possibility of reverter only. So also where a grant is made in fee reserving a rent, with a clause of re-entry, or a term of years is assigned with a clause of re-entry for breach of condition, there is no reversion, but a possibility of re-entry for breach only(*o*).

(*o*) *Doe d. Freeman* v. *Bateman*, 2 B. & Ald. 168 and authorities cited.

We have alrcady dealt with possibilities, and attempted to show that they are not within the enactment in question; but it may be useful to further consider this particular species.

Such an interest is a pure right, the person entitled having no estate in the land. It was a descendible right, but not a devisable one at common law. Though descendible, it did not follow the same course of descent that the land itself would have followed had it been retained. This was strikingly apparent in the case of customary lands; for the common law heir always succeeded to the right of entry, though after entry the customary heir might enter upon him or enjoy with him(*p*).

And if a man seised *ex parte materna* made a feoffment on condition, and died, and the condition were broken, the heir *ex parte paterna* had the right to enter; but the heir *ex parte materna* might in turn enter on him(*q*). And if a man, seised in right of his wife, made a feoffment on condition, and died, the heir of the husband had the right of entry by descent from him, but the wife or her heir could afterwards enter on him(*r*). The person claiming the right of entry had to make himself heir to the *person* of the grantor(*s*). The condition is not an incident of the estate(*t*).

And where there is a devise upon condition, the heir can take advantage of the condition, though no estate descend upon him(*u*). Thus, a devise to A., on condition to pay C. a sum of money, and no clause of re-entry; the heir at law might enter and take advantage of the breach of the con-

(*p*) Shepp. Touch. 140, note (*y*), and 149.

(*q*) 2 Preston on Abstracts. In a note to Watkins on Descent, 4th ed. 227, this is said to be a "cunning case."

(*r*) 2 Preston on Abstracts, 427; Shepp. Touch. 150.

(*s*) 2 Preston on Abstracts, 422.

(*t*) Watkins on Descent, 227.

(*u*) *Whittingham's case*, 8 Rep. 44 a; Shepp. Touch. 150.

dition, but he was considered in equity as trustee for the legatee to the extent of his legacy(*v*). He who was prejudiced by the devise was entitled to the benefit of the condition, and so it need not have been reserved by express words(*w*).

Such a right was not assignable or devisable, and could be exercised at common law only by the heir(*x*).

For two years, rights of entry for condition broken were made assignable by deed, by an early statute(*y*). But this enactment was repealed, and a new clause enacted, whereby rights of entry on disseisin only are made so assignable(*z*). Rights of entry for condition broken are included in the Statute of William IV. and the Wills Act before 1874, under the words "possibility, right or title of entry or action, and any other interest capable of being inherited(*a*)," and in the present Wills Act by express words(*b*).

They appear to be included in the Inheritance Act, which under the name of real estate includes "every estate, interest and right, legal and equitable, held in fee simple or for the life of another, in lands, tenements and *hereditaments.*" By a generous interpretation this right might be included in the phrase "every right in a hereditament."

The conclusion is, then, that a right of entry for condition broken, or the benefit of a condition, may descend or be disposed of by will, but does not in either case pass to the personal representative. On intestacy it passes to the heirs under the Statute of Victoria. But if it is not included

(*v*) *Wigg* v. *Wigg*, 1 Atk. 383; to the same effect, *Hodgson* v. *Rawson*, 1 Ves. Sr. at p. 47.

(*w*) 1 Roll. Abr. 407.

(*x*) Shepp. Touch. 149.

(*y*) 12 V. c. 71, s. 5.

(*z*) 14 & 15 V. c. 7, ss. 1, 5, now R.S.O. c. 119, s. 8; *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; *Bennett v. Herring*, 3 C.B.N.S. 370.

(*a*) R.S.O. c. 127, s. 22, s.-s. 1; R.S.O. c. 128, s. 2.

(*b*) R.S.O. c. 128, s. 10; *Re Melville*, 11 Ont. R. 626.

within that statute, but descends to the heir by the common law rules as modified by the Statute of William IV., then by analogy to the old law, the heir or devisee so entitled to enter would probably be liable to entry by, or would hold in trust for, other persons who might have made themselves heirs to the estate, or persons who might have a charge on the land by devise or bequest.

(ii) *Where There is a Reversion.*

Secondly, as to rights of entry for condition broken, where there is a reversion. A distinction must be drawn at the outset between grants upon condition, where the breach of the condition *ipso facto* puts an end to the estate, and grants upon condition, where the breach entitles the grantor to re-enter and so put an end to the estate. In the former case, the estate comes to an end by the breach, *i.e.*, the estate being limited to last until the breach, comes to an end without entry. And in such a case, if the grantee on condition remains in possession after the breach, he is a trespasser or disseisor, and the right of entry is a right of entry on a disseisin.

In the latter case, the estate continues in the grantee, notwithstanding the breach, until entry by the grantor or his heirs, which entry will put an end to the estate. It is these latter rights that we have now to deal with. And again, with regard to grants of this nature, it must be observed that reversioners have two rights of entry:—First, a right of entry for breach of the condition, and secondly, a right of entry at the determination of the estate granted. These are of essentially different characters, the latter being a right of entry upon a trespasser and not within our present examination. The former, the right of entry for forfeiture, is what we have to deal with.

A right of entry for condition broken, where it exists, must always be exercised by the person entitled for the

time being to the reversion(*c*), and, therefore, it is a right incident to an estate. The right of re-entry cannot be reserved to, or exercised by, a stranger to the reversion, even though the lease expressly purports to confer the right upon him, and he is a party to the demise as having an equitable interest(*d*).

But it does not at all follow that the person having the reversion can always exercise a right of entry for breach of a condition—or perhaps it may be more properly said that the reversioner has not always got a right of re-entry for breach.

Thus, at common law, the benefit of the condition for re-entry was not assignable, though the reversion was, and the Statute of 32 Hen. VIII. c. 34, which gives to assignees of reversions the same benefit of covenants that the original lessor had, does not enable an assignee of a reversion to enter for breach of a condition which occurred before the assignment. Consequently, if a breach occurred, and then the reversioner assigned his reversion, the right of entry is extinguished. It does not pass to the assignee with the reversion, for it is not assignable; and the original lessor cannot re-enter, because he has not the reversion. The possession of a right of re-entry is not essential to the enjoyment of the estate, as is the right of re-entry on a disseisin. Thus, where a breach occurs, it is at the election of the reversioner either to avoid the estate(*e*), or to waive the breach and retain the reversion. Now, if the reversioner assigns his reversion, he must assign an existing and enduring estate, *i.e.*, he must elect that the reversion shall remain a reversion for the purpose of assignment. Therefore, the assign-

(*c*) *Doe d. Marriott* v. *Edwards*, 5 B. & Ad. 1065.

(*d*) *Doe d. Barker* v. *Goldsmith*, 2 Cr. & J. 674; *Doe d. Barney* v. *Adams*, Ibid. 232.

(*e*) Sir Geo. Jessel, M.R., said in *Jenkins* v. *Jones*, 9 Q.B.D. at p. 131, that that was the reason why rights of entry for condition broken were not made assignable.

ment of a reversion naturally forbids the assumption that a right goes with it, as an incident, to defeat the particular estate and so convert the reversion into a present estate.

That such an arrangement could be authorized by statute is undoubted, but without a statute explicitly authorizing it, we cannot assume that in every case where a reversion is devised to any person, it carries with it a right of reentry for antecedent breach of a condition.

When rights of entry for condition broken were made devisable, it became possible for the testator to devise, not only the reversion, but also the right of entry for a breach which occurred in his lifetime, provided, of course, that he had not waived his right to enter. And naturally by his devise he would cast the right of entry upon the devisee of the land. But apparently the devise would have to be by express words, so as to show the intention to enable the devisee to enter(*f*). But where a testator devises a reversion in fee simple together with a right of entry for condition broken, and the statute enacts that the *estate* shall go to the executor, but says nothing as to the right of entry, which is not an incident of the estate, the result is that the executor cannot enter because the right is not given him, and the devisee cannot do so because he has not the reversion. The statute which passes the estate to the executor, but says nothing as to the right of entry, can have no greater effect than the Statute of 32 Hen. VIII., which gave the benefit of conditions to assignees, but did not thereby pass to the assignee the right to enter for an antecedent breach. The right of entry is not assignable, and therefore it cannot be conferred by the devisee on the executor. The only way in which they can meet again, is for the executor to convey the reversion to the devisee. If he does not do so, but sells the reversion for the purpose of paying debts, the right of entry would be extinguished. But the benefit of

(*f*) See and consider *Leach* v. *Jay*, 9 Ch. D. 42.

the condition for future breaches would pass with the reversion.

Where the reversioner dies intestate the reversion goes to the administrator, but the right of entry, not being mentioned in the enactment, goes to the heir at law; and as the land is ultimately distributed amongst the next of kin, it appears to be the result that the right of entry for a breach before the death of the intestate would be extinguished by his death.

Rights of entry for condition broken are not mentioned in the Inheritance Act, but they are specially mentioned in the Statute of William IV. Being reserved to the heirs, and capable of being so reserved only, it might be held that the benefit of a condition would pass to the heirs under the Inheritance Act. But whether a right of entry for a breach which occurred before the death of the testator would pass to the heirs, being rather of the nature of a right of action, and being specially mentioned in the Statute of William IV., and omitted from the Inheritance Act, is doubtful.

10. *Free Grant Lands.*

If the chief policy of *The Devolution of Estates Act* is to enable the personal representative to make use of the land for the payment of debts, Free Grant lands must be excluded from its operation during the period of its exemption from debt, viz., twenty years from the date of the location.

Before the patent issues, and while the locatee is in as locatee, he has no power to alienate, mortgage or pledge the land located, or any right or interest therein, but may devise it(*g*). After the patent issues, no alienation (otherwise than by devise) during the lifetime of the locatee's wife is valid, unless the wife joins as a granting party and executes the conveyance(*h*). And, by section 25 it is enacted as fol-

(*g*) R.S.O. c. 29, s. 19.
(*h*) S. 20.

lows:—"(1) No land located as aforesaid, nor any interest therein, shall in any event be or become *liable to the satisfaction of any debt or liability* contracted by the locatee, his widow, heirs or devisees before the issuing of the patent for the land. (2) After the issuing of the patent for any land, and while the land or any part thereof, or interest therein, is owned by the locatee or his widow, heirs or devisees, such land, part or interest, shall during the twenty years next after the date of the location be *exempt from attachment, levy under execution, or sale for payment of debts*, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent." Rates and taxes are also a valid charge(*i*). It seems then that mortgages, pledges, rates and taxes are the only debts to which the land can be subjected during the period of exemption, and as these imply the putting into operation of the ordinary means of securing payment, there seems to be no reason for applying *The Devolution of Estates Act* to such lands. It would seem to be unnecessary to vest the land in the personal representative from time to time merely in the case of the existence of a mortgage or of arrears of taxes. And not only does it appear to be unnecessary, but improper, inasmuch as the vesting by *The Devolution of Estates Act* does not depend upon the existence of debts, it is absolute. The conclusion appears to be clear that the Act does not apply to vest the land in the personal representative, as it is not subject to debts.

The provisions of *The Devolution of Estates Act* as to distribution are also inconsistent with the devolution of the land by *The Free Grants Act*. Before *The Devolution of Estates Act* was passed the Inheritance Act was displaced

(*i*) S. 26.

to a sufficient extent to enable *The Free Grants Act* to have its full operation. Thus, on the death of the locatee, the land descends to the widow, if any, of the locatee or patentee, during her widowhood in lieu of dower; but she may elect to take her dower. It is clear that the Inheritance Act must give way to this special enactment. And if so, it seems also to be clear that the widow of a free grantee should not have a further election to take under *The Devolution of Estates Act*, but that that enactment should also completely give way to the special provisions of *The Free Grants Act*.

CHAPTER VI.

General Scheme of the Act.

1. *Effect Upon Limitations.*
2. *Effect Upon Administration.*
3. *Effect Upon Succession.*
4. *Conclusion.*

It is difficult and hazardous to attempt to define the scheme of an Act which, in many instances, appears to have been drawn without a due appreciation of its probable effect; and which from time to time has been added to without much regard for consistency between the various sections. And the decisions upon various points arising under the Act do not venture upon the enunciation of any fundamental principles, but are confined to deciding the particular points in dispute. Perhaps the cases did not call for more than has been said. It is true that some general expressions of opinion are found, but they are not wide enough to build upon, and in some respects they are contradictory.

The Act must be considered with respect to three principal matters:—(1) Its effect on land itself, and its mode of limitation; (2) Its effect upon administration; (3) Its effect upon succession.

1. *Effect Upon Limitations.*

(1) Its effect upon the land itself and the mode of limitation. Undoubtedly no intention is discerned in the enactment to change the characteristics of land or the mode of limitation of it. On the contrary, the estate in fee simple, and the estate for the life of another are to continue, and

the Act is to affect only those estates. Indeed, their continued existence in their preceding forms is necessary to the very existence of the Act itself. The limitation of an estate to a man and his heirs will still be proper, and will indicate, as it long has indicated, merely that it is a fee simple. And, although the estate may go to the beneficiaries in shares, yet it goes as land, and in their hands again is liable to devolution as an estate in fee simple on their demise. The Statute of Frauds was said not to have changed the nature of the estate *pur auter vie* from a freehold to a chattel, and, therefore, it was not distributable under that Act(*j*), but was subsequently made distributable by the Statute of 14 Geo. II. c. 20. *The Devolution of Estates Act* makes estates distributable, but estates affected by it, like estates *pur auter vie* under the Statute of Frauds, retain their peculiar characteristics.

2. *Effect Upon Administration.*

(2) As to the effect on administration. The first general expression as to the scope of the Act, as it originally was passed, is found in *Re Reddan*(*k*), where the Chancellor stated that the effect of this Act was "to abolish the distinction between real and personal property for the purpose of administration, and to devolve the whole of the estate upon the personal representative." Even as the enactment originally stood (that is, without the amendments providing for the shifting of land into the beneficiaries), this is too wide. And the same learned judge pointed out in a later case(*l*), that the distinction between realty and personalty had been retained for some purposes. Real property, it is true, devolved upon the personal representative, and he was thus put in possession of a

(*j*) *Oldham* v. *Pickering*, Salk. 464.
(*k*) 12 Ont. R. 781.
(*l*) *Re Nixon*, 13 P.R. 314.

fund for the payment of debts which before could be reached only by process. But the distinction between realty and personalty is not abolished, even for purposes of administration. The order of administration upon intestacy remains as before, and personalty is still to be exhausted before realty is resorted to(*m*). The object of the Act as regards administration is perhaps better expressed in *Re Koch & Wideman*(*n*), as "intended, as appears on its face, to aid executors and administrators to deal with the estates which are required for the payment of debts, where such aid is necessary to enable them to do so," and so the process of administration out of court is simplified, while the principles, and the procedure and practice, remain the same(*o*).

And by the 7th section of the Act, the realty and personalty comprised in a residuary disposition are to be applied ratably to the payment of debts; thus very clearly preserving the distinction between them.

Both realty and personalty then, retain their individual characteristics and liability for debts in the proper order in course of administration.

3. *Effect Upon Succession.*

(3) As to the effect upon succession. The whole course of succession to land is changed by the Act. It is true that it is to be distributed as personal property is distributed but it remains land. But, as it is to be distributed as personalty, the person who would take personalty now takes the land, if it is not previously disposed of for payment of debts.

"It is true that for some purposes," said Burton, J.A.(*p*), "land is treated as personal property, and, if not

(*m*) *Re Hopkins*, 32 Ont. R. 315.
(*n*) 25 Ont. R. at p. 267.
(*o*) *Ianson v. Clyde*, 31 Ont. R. at p. 586, *per* Boyd, C.
(*p*) *Sproule* v. *Watson*, 23 App. R. at p. 697.

otherwise disposed of, is to be distributed as personal property, and that it devolves upon and becomes vested in the personal representative for a limited time, and that at the expiration of the time mentioned in the statute the land vests as realty in the devisees, without any conveyance by the executors." Again, Maclennan, J.A., described the effect of the Act as follows:—"The Devolution of Estates Act has not put land in all respects in the same position as personal estate, and I apprehend that the title of land devised, after the lapse of twelve months without caution, vests in the devisee, and does not require the assent of the executor, like a legacy(*q*)."

In a case under the Imperial Conveyancing Act, which declares that the estate of a trustee or mortgagee shall devolve on his personal representatives or representative from time to time, it was said that there was an evident intention to exclude the heir in favour of the personal representative(*r*). And in an Australian case the heir was held to be excluded altogether in favour of the next of kin under an Act in the following words:—"All land which by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such land pass to his heir at law, shall instead thereof pass to and become vested in his personal representatives." "All lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets without distinction as to order of applicaion for payment of debts or otherwise(*s*)."

Our enactment seems utterly to abolish the heir for purposes of succession, for the land is to be distributed as personal property is to be distributed, and that is amongst the

(*q*) *McKinnon* v. *Lundy*, 21 App. R. at p. 567.
(*r*) *Re Pilling*, 26 Ch. D. 432.
(*s*) *Plumley* v. *Shepherd*, L.R. (1891) A.C. 244.

next of kin. Thus the whole course of succession is altered.

The rules of the civil law obtained in the Ecclesiastical Courts for the purpose of ascertaining the persons entitled to administration by proximity of blood(*t*), and as the right to administration follows the right of property, so the same rules determine who are entitled to share(*u*).

The changes made will be dealt with subsequently(*v*).

It is true that the next of kin are called heirs in the amendments to the Act. But they are different persons from the heirs under the Inheritance Act. The term now means next of kin where they succeed to land.

Land thus retaining its characteristics as land, is, "notwithstanding any testamentary disposition," to devolve upon the personal representative. Whether the owner die testate or intestate, the statute casts the estate upon the personal representative. He thus obtains a statutory title(*w*), which nothing can anticipate.

Thus, where the owner devises his land the devisee cannot take under the will immediately. His title is suspended, and, notwithstanding the devise, the statute casts the land upon the executor, who, having a full and absolute title in fee simple, may completely defeat the title of the devisee by sale for the purpose of paying debts if it should become necessary to so appropriate it. And, in the case of an intestacy, heirs no longer exist. The whole legal and beneficial interest devolves by statute upon the administrator, and he is likewise able to make a good title in fee simple if necessary.

If the personal representative has no need of the land for the purpose of paying debts, it shifts of its own accord into the devisees or next of kin, as the case may be. The title of the devisee is then direct from the testator, the stat-

(*t*) Williams on Executors, 9th ed. 355.
(*u*) Ibid., and p. 1377.
(*v*) Post. chapter XXI.
(*w*) *Re Booth*, 16 Ont. R. at p. 430.

utory title of the executors having been spent. The title of the next of kin on an intestacy is peculiar. It may come to them by conveyance from the administrator. But the land will, even if no administrator is appointed, shift into them at the end of three years. And so, their title may, in a sense, be said to be derived from the intestate, and not from the administrator, though the potential statutory title of the administrator does in fact exist, even if letters of administration are not granted.

At the end of three years from the death of the owner, if no caution is registered, the title of the devisees or next of kin becomes perfect, to the extent that they may sell, charge or encumber, but qualified to this extent, that, saving the rights of such persons as may have acquired rights for valuable consideration, and the rights of beneficiaries for improvements made after the year, or three years, the land may be again taken by the personal representatives for sale.

4. *Conclusion.*

The scheme of the Act then, seems to be, as far as succession is concerned, that land shall retain its character of land, as distinguished from personalty; like personalty, however, it will pass to the personal representative with a complete and absolute right and title in fee simple; failing a disposal of it by the personal representative within three years, it passes at the end of that time without conveyance, if the personal representative does not retain it, to the devisees if there is a will; if there is an intestacy, the whole course of beneficial succession is changed, and the land passes to the next of kin. In the hands of either devisee or next of kin, it is still liable to recall by the personal representative for the purpose of paying debts, subject, however, to rights acquired from or by the devisee or next of kin.

It may probably be correct then to roughly describe the effect and purpose of the Act as changing the right of succession to land from the heirs to next of kin; and suspending or diverting the title of the devisee or next of kin after the death of the owner, and vesting the land in the personal representative for the special purpose of administration, and transferring the land to next of kin or devisees if the personal representative does not require it.

With respect to administration, the only change in policy with regard to land is found in section 7 of the Act, which subjects land and personalty ratably, according to their respective values, to payment of debts where they are comprised in a residuary devise or bequest. The mechanical contrivance for carrying out administration is to vest the land in the personal representative. But, except as mentioned, there is no change in the policy of the law as to the order of administration.

We have not touched upon dower, curtesy, or the disposition of infants' lands, which are dealt with by the enactment, because they are matters of detail, and in no way interfere with, nor are they interfered with by, the general scheme and policy of the Act. We shall endeavour to treat of all these matters more in detail as we proceed.

CHAPTER VII.

The Interval Between Death and Administration.

1. *Vacancy on Intestacy.*
2. *Theory of General Occupancy.*
3. *Theory That Occupant is Executor* De Son Tort.
4. *Theory That Beneficiaries are Equitable Owners.*

In an examination of the effect of this Act the interval between the death intestate of an owner and the grant of letters of administration naturally presents itself first for consideration. Where a will is made the statute makes the estate devolve upon the executor, who is a person *in esse* at the death of the testator, and upon whom the land will devolve at the moment of the testator's death(*x*). There is thus no break in the continuity of ownership. An executor's title being derived from the will, there is no interval of time after the death of the testator in which the land is without an owner, except in the case, which must rarely happen, where there is no executor appointed by the will, or where the executor appointed has died before the testator. To these rare cases, the remarks as to intestacy will also apply.

1. *Vacancy on Intestacy.*

Where the owner dies intestate, a highly anomalous state of affairs is produced, a position hitherto unknown to the law, and contrary to the inexorable feudal rule that the freehold must not be in abeyance. The only approach to a parallel is that produced by the enactment that the estate

(*x*) See *Re Pawley & Lond. and Prov. Bank*, L.R. (1900) 1 Ch. 58.

of a bare trustee shall devolve upon his personal representative. But this is not a strict analogy, for in that case there is a full and complete beneficial ownership in the *cestui que trust*; while in the case in hand the beneficial, as well as the legal ownership is in suspense awaiting the grant of letters. Nor is the case of an estate *pur auter vie* an exact parallel; for these estates were never estates of inheritance; and although an estate limited to the heir as special occupant was sometimes called a descendible freehold, the correctness of this nomenclature was challenged on the ground that where the heir took the land it was not assets by descent in his hands.

In the Roman Law a juridical personality was regarded as existing distinct from the physical personality of the human being in whom it might for the time being reside; and when the physical personality ceased to exist, the juridical personality did not become extinct, but continued to exist in the inheritance; and under these circumstances the inheritance was said to be an *Hereditas jacens*(*y*). "As a rule, a certain period of time, of shorter or longer duration, elapsed between the death of the testator, and the *Adition*, or entrance of the heir upon his Inheritance: hence, the question must arise, who is the party to be clothed with the legal personality of the *Defunctus*; or, as the Germans express it, 'Who is to be the *Träger* during this intermediate period of time?' In the absence of a natural person, a juridical person must be found to accept the inheritance, and such a juridical person is created in the person of the *Hereditas jacens*. This juridical person, for the interval, is regarded as the owner of the things constituting the inheritance. Thus the *Hereditas jacens* may acquire rights, and may also incur liabilities; but only under circumstances in which no special act of the will is required; for it is manifest that the *Hereditas jacens* is possessed neither of capa-

(*y*) *Tomk. & Jenck.*, Rom. Law, 204.

city to act nor organs or means of action. The fiction of the personality of the *Hereditas jacens* ceases the very moment that the heir has entered upon the inheritance. But even after the *Adition* of the heir, the juridical person of the *Defunctus* must be still considered as residing in the Inheritance. The heir is, however, always considered as the representative of the juridical person of the *Defunctus*, and even when, in point of fact, a commingling of the property of both has taken place, in point of law, the estate of the deceased is always considered as distinct from the property of the heirs(*z*).".

This continuity of Right and Obligation exists in our own law, which is not, however, scientific enough to have assigned a fictitious person to represent it.

"The estate" of the *Defunctus*, as we denominate it, may incur obligations even before the grant of letters of administration. Thus, taxes may be imposed, interest and rents will accrue, obligations will mature, and damages be incurred by detention of the money. And time will run under the Statute of Limitations against the administrator from the death of the intestate, though he may not be appointed for some time(*a*). And in the same way interest and rents will accrue in favour of the estate, obligations in its favour will mature, and rights of indemnity may arise against defaulting debtors, if the deceased was a surety.

But this does not get rid of the difficulty occasioned by the feudal rule that there must always be seisin of the freehold. Before this enactment, the heir became seised in law at the same moment in which his ancestor died. There was not even an imaginary break in the continuity of ownership.

Under *The Devolution of Estates Act* there is a distinct break in continuity of ownership, for the heir is not merely

(*z*) Ibid. 205.
(*a*) R.S.O. c. 133, s. 7.

excluded(*b*), but is, in fact, entirely superseded by the next of kin, who now take, not by inheritance, but in course of distribution under the present Act and the Statute of Distributions. In this interval of vacancy, what, then, is the condition of the land? It is not a matter of mere academic interest. For, if the family of an owner who died intestate should continue in possession, and should take the profits of the land, before administration, it might be a serious question to solve, whether they thus rendered themselves liable as executors of their own wrong, or could claim to occupy by some title of their own(*c*). Similarly, if one member of a family, under such circumstances, were to occupy during the vacant interval, would he be chargeable as an executor *de son tort*, or be liable to "the estate" for an occupation rent, or could he claim title as an occupant of land which had no legal owner until an administrator was appointed? There appear to be three phases which the question may assume.

First, a title by general occupancy may be acquired by any one who may choose to enter.

Secondly, any person taking possession may be treated as an executor *de son tort*.

Thirdly, the next of kin may be treated as equitable owners, subject to payment of debts, and so entitled to possession until administration is granted.

We shall examine each of these hypotheses in turn.

2. *Theory of General Occupancy.*

First, with regard to occupancy. The only case, hitherto, in which title by occupancy was known, was that occasioned by the death of tenant *pur auter vie* during the lifetime of

(*b*) *Re Pilling*, 26 Ch. D. 432.

(*c*) In Com. Dig. Tit. Estates by Grant, F. 1, it is said, "If at the death of tenant *pur auter vie*, his wife and son be upon the tenement, they shall not be occupants *without more*, for the uncertainty." *Sed quaere*, 2 Crabb on Real Prop 80.

cestui que vie, when an anomalous state of affairs arose, namely, a vacancy of the land. To this we naturally turn in order to ascertain what is a title by occupancy, how it arises, and how it has been affected by legislation, which, in some respects like the present, cast such estates in certain events upon the personal representative. If we find that title by occupancy occurs, because, from a certain combination of circumstances, there is, for the time being, no immediate owner, with an actual present title, then if any other combination of circumstances produces exactly the same result, the same consequences ought to follow.

As we have already seen(*d*), estates limited for the life of another were, by the Statute of Frauds, made assets in the hands of the administrator, if not devised. So that we have a very close analogy to the present enactment, except in this, that the estate *pur auter vie* was not inheritable, while the estate in fee simple, which devolves on the administrator under the present enactment, is inheritable. But in each case there is the same vacancy before grant of letters of administration.

We have first, then, to ascertain how title by occupancy arises, and what is the nature of it; then, how it has been affected by legislation; and, finally, to trace the analogy to the present state of affairs, and apply to it the principle of the prior law.

Title by general occupancy comes by *entry* only. "He that first entreth," says Coke(*e*), "shall hold the land during that other man's life." And, against the King, there can be no occupant, because *nullum tempus occurrit regi*. "And therefore no man shall gain the King's land by *priority* of *entry*(*f*)."

So there can be no occupancy of incorporeal heredita-

(*d*) Ante, p. 10.
(*e*) Co. Litt. 41 *b*.
(*f*) Ibid.

ments, or things that, at common law, lay in grant(*g*). "They do not lie exposed to be taken possession of by the first passer-by"(*h*). Neither were copyholds subject to any such law, for the seisin or feudal possession of all such lands belonged to the lord of the manor(*i*). Blackstone likened the vacant estate to the *hereditas jacens* of the Romans: "The law left it open to be seized and appropriated by the first person that could enter upon it"(*j*). The title by occupancy, therefore, such as it is, is the right of any occupant who gets possession to hold the land until the accrual of a subsequent legal title.

The law cast the freehold on the occupant, not only to prevent any abeyance, but that there might be a tenant to do the services and to answer to the præcipe of strangers(*k*).

Next, as to the effect of the Statute of Frauds upon the estate *pur auter vie*. Blackstone says that title by common occupancy was reduced "almost to nothing" by the statutes of Charles II. and George II.(*l*). Hargrave, in a note to Coke upon Littleton(*m*), says, "The title by general occupancy is now universally prevented by the 29 Car. II. c. 3, s. 12, and the 14 Geo. II. c. 20, s. 9." And he cites a case as to the effect of the first statute (the Statute of Frauds), which only made an estate *pur auter vie* assets in the hands of the administrator for payment of debts. "The administrator is, as it were, the occupant, and shall not be compelled to distribute"(*n*).

It is evident, from the reference to this case, that Hargrave intended merely to show what was frequently stated,

(*g*) Ibid.
(*h*) Williams on Real Prop. 19th ed. 422.
(*i*) Ibid. 461.
(*j*) 2 Bl. Comm. 259.
(*k*) Bac. Ab. Tit. Estate for Life and Occupancy, (B) 2.
(*l*) 2 Bl. Comm. 259; see also Cru. Dig. Tit. III. c. 1, s. 45.
(*m*) Co. Litt. 41 b, Note 5.
(*n*) *Oldham* v. *Pickering*, 12 Mod. 103.

though sometimes controverted(*o*), that the administrator under this statute became a *special* occupant, not accountable to the next of kin for any surplus after payment of debts. He did not refer to the vacant interval before the grant of letters, and consequently he did not intend to dispose of the questions that would arise in case administration were not granted. Passing over the question as to whether an administrator is or is not a special occupant, or even assuming that he can be, that does not dispose of the vacant interval, nor of the disposition to be made of the property if administration should not be granted at all.

If no grant of letters were made, the creditors of the deceased tenant *pur auter vie* could not, under the Statute of Frauds, claim possession of the land, or any title thereto; for that statute gave them no title to the land, but only a right to have it administered. Neither could the next of kin, under the Statute of George II., lay any claim to the land itself, for their right was but a right to distribution of the surplus after payment of debts. If no administrator were appointed, in such a case, or until appointment, the land would have been just as much open to occupancy as before that Act was passed. The statute did not abolish occupancy, but only passed the land to the administrator, and so prevented common occupancy *pro tanto*. But if the statute was not operative for want of an administrator, a title by occupancy might still occur.

Both Preston and Burton arrive at this conclusion. Preston says(*p*), "And there is one case in which, perhaps, there may for a time, even at this day, be a freehold by *general occupancy*, namely, in the interval between the death of a tenant *pur auter vie*, who dies intestate, and the time of obtaining letters of administration of his effects. Without allowing a title by occupancy to exist, for this intermediate

(o) See 1 Preston on Conv. 44.
(p) 1 Preston on Conv. 44.

time, the maxim of the law, which so carefully guards against the *abeyance* of the freehold, would be infringed."

Burton is to the same effect(*q*). "But notwithstanding this provision (the Statute of Frauds), it seems that where a person who is seised of an estate for another's life, which is not descendible to his heir, dies intestate, the old rule of occupancy must take place until the appointment of an administrator; as the immediate freehold would else be in abeyance during that time, which the law will not allow for a moment."

Bisset is to the same effect. "There appears to be still one case in which the old rule of general occupancy must prevail, namely, that where a tenant of an estate *pur auter vie*, which is not descendible to his heir, dies intestate. During the interval between the death of the intestate tenant and the appointment of an administrator, it seems a consequence of the maxim of law, which requires that the freehold shall not be in abeyance for a moment, that the tenement, if a corporeal one, should be open to occupancy"(*r*). This opinion, though cumulative, is not entirely independent, for the author cites Preston at a passage immediately following the one above quoted.

It remains to trace the analogy between these estates and the estates affected by *The Devolution of Estates Act*, and to apply the principles referred to.

In the case of estates *pur auter vie*, the law, so to speak, found a vacancy, and provided an owner, who, however, could not come into existence until a certain period had elapsed after the death. So that it reduced the period of occupancy ("almost to nothing," as Blackstone said) rather than abolished it.

The Devolution of Estates Act found a continuous ownership in the ancestor and heir, but superseded the heir,

(*q*) Burton on Real Prop., 8th ed. § 735.
(*r*) Bissett on Life Estates, 169.

and created the very vacancy which the Statute of Frauds shortened. The administrator, before his appointment, is a stranger to the title. Upon the grant of letters he becomes for the first time entitled, and becomes nant in fee simple. An "estate of inheritance in fee simple" devolves upon him. And when he enters, he enters by virtue of his title, not as an occupant, during a vacancy, but as tenant in fee simple. If the statute had not abolished heirship and inheritance, there would have been some ground for the opinion that the land might, on the death of the intestate, have descended upon the heir awaiting the grant of letters. But such cannot be the case, for the land is to be distributed as personalty is distributed. During this vacancy there is no one entitled to an immediate estate, the freehold is in abeyance, and the exact state of circumstances exists for the application of the opinions of Preston and Burton, namely, the land is open to occupancy.

3. *Theory That Occupant is Executor* De Son Tort.

Secondly, as to the hypothesis that any one entering may be treated as an executor *de son tort*. An executor *de son tort*, as defined by Wentworth and others, is "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [ecclesiastical] court to administer"(*s*).

Williams defines him as follows:—"If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or, more usually, an executor *de son tort*"(*t*). These definitions are necessarily general in terms, and do not advance us very

(*s*) Williams on Executors, 9th ed. 208, note (*a*).
(*t*) Ibid. 208.

far without concrete examples. The question whether a person did certain acts is a question of fact, but when the acts are proved it is a question of law whether they constituted the person doing them a *tort* executor(*u*).

The same acts, done with different intents, may produce different results. This will be found to be the case with regard to possession of land. It is not necessary to enter into an examination of the various examples of acts constituting a person executor *de son tort*, provided that we find how the possession of land has been treated.

It appears to be the law that a person entering upon land, under lease for years, and *claiming the particular estate*, becomes executor *de son tort* of the term(*v*). But if he enter generally he is presumed to claim *the fee by wrong*, and is not executor *de son tort*(*w*). This distinction will be seen to be of great importance as we proceed, for, while possession is an essential condition(*x*), bare possession is not sufficient to create the wrongful executorship; and the character or nature of the possession, and the intent of the occupier, are essential factors in the determination of the question. In connection with this view of the subject it is also to be observed that it is implied, if not definitely stated, in the opening definitions, and justified by authority, that acts appertaining to the office of an executor must be performed, so as to convey an intimation to creditors that they may look to the person doing the acts as executor, before such person can be treated as an executor *de son tort*. Thus in *Peters* v. *Leeder*(*y*), Lush, J., said, "This definition [*i.e.*, Wentworth's definition of an executor *de son tort*]

(*u*) *Padget* v. *Priest*, 2 T.R. 97.

(*v*) Williams on Executors, 9th ed. 209, and see *Metters* v. *Brown*, 1 H. & C. 686; *Paull* v. *Simpson*, 9 Q.B. 365.

(*w*) Williams on Executors, 9th ed. 209.

(*x*) There cannot be a wrongful executorship of a term in reversion, because it is incapable of entry. Williams on Executors, 9th ed. 209.

(*y*) 47 L.J.Q.B. 573.

implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise. It is obvious that it is not every intermeddling with the goods of the deceased which is wrongful. Acts which are not destructive of the property, and which do not otherwise amount to a conversion of goods, are wrongful or not, according to the intent."

The question now presents itself whether the occupation of land in the vacant interval will constitute the occupant executor *de son tort*.

Again, we turn to estates *pur auter vie*, as affected by the Statute of Frauds, as the only instance (until the present enactment) where an administrator became entitled to a freehold.

There is a dictum of Robinson, C.J., to the effect that a person entering upon land held *pur auter vie* after the death of the tenant may become executor *de son tort*, "because by going into possession he announces himself executor"(*z*). But the case did not call for any expression of opinion upon the subject, and we have just seen that mere possession of leasehold land does not constitute the occupant a tortious executor unless he claims the term.

There is only one decision on the point, and if on examination it proves to be in point, the theory of general occupancy must be abandoned, in favour of the theory that the occupant becomes executor *de son tort*.

The case is *Bradburn* v. *Kennerdale*(*a*). The action was replevin for taking a cow damage feasant. The defendant avowed that he was the bailiff of of Sir Peter Warburton, who, before and at the time of the taking, was seised of a manor of which the *locus in quo* was parcel. The plaintiff

(*z*) *Gardiner* v. *Gardiner*, 2 O.S. at p. 600.
(*a*) 3 Mod. 318; Carth. 166.

pleaded to this, confessing that Sir Peter Warburton was seised in fee, but alleging that, before that time, Sir George Warburton, his father, was seised, and, being so seised, made a lease for three lives; that one life dropped, and another for whose life the land was leased, entered and was seised as *occupant*, and let the land to the plaintiff. The defendant demurred, and had judgment, and the case came on upon exceptions to the pleading, first, for want of a traverse that Sir Peter Warburton was seised in fee; secondly, for want of sufficient title alleged in the plaintiff, for that by the Statute of Frauds, all occupancy was taken away. The judgment was affirmed on the pleading, namely, that it was bad for not traversing the seisin in fee. This would have been sufficient for the case, as the demurrer being allowed judgment would have gone for the defendant. But the Court (*per* Holt, C.J.), on the second point, said(*b*), "As concerning the occupancy, the title under the occupant was good, for the statute did not take away all occupancy, but transferred it to executors; and he held that B., the lessor of the plaintiff, was executor *de son tort*, by his entry on the lands, because the aforesaid statute made it assets." While it would not be becoming to belittle this dictum, the case is certainly open to the criticism that it was a case of pleading only, and the insufficiency of the pleading was determined apart altogether from this point; and that the *dictum* upon the point in question was *obiter*. This might not have been of so much consequence, if it had stood alone; for almost any opinion on a point of the kind, in the absence of other authority, could easily be accepted as a guide. But the opinions of Preston, Burton and Bisset, two of them at least, of undisputed learning and authority, cannot be ignored; and we must therefore make some test of the *dictum* before accepting it as conclusive.

(*b*) Carth. 166. The report in 3 Mod. seems to be only of the argument, for it is said that no judgment was then given. In a note there is a reference to Carth. where the judgment is reported.

The only references, apart from the reports, that the writer has been able to find to this case are in a marginal note to Bacon's Abridgment(*c*), and in Comyn's Digest(*d*), in the latter of which it is thus interpreted:—"And he who enters shall be occupant, but *quoad* creditors he is executor *de son tort.*" One can hardly suppose that, at a time when these works must have been largely consulted, perhaps more often than at present, this decision would have been entirely overlooked by such conveyancers as treated of the very point, and by all others in treating of the effect of the Statute of Frauds(*e*). And in the early editions of Williams on Executors, before the Statute of Wills, which made a complete alteration of the law affecting estates *pur auter vie,* there is no reference made to it, though very ancient authorities are cited in the same work to show that possession of land under lease by a person claiming the particular estate, will constitute him executor *de son tort.* If we may assume that the case was considered of no authority by conveyancers, perhaps we should accept their ignoring of it. If it was overlooked entirely, it can only be said that it is a very remarkable oversight. Under any circumstances its complete neglect by all writers, who might have been expected to refer to it, is almost tantamount to condemnation.

It is impossible to suppose that Preston, Burton, and Bisset intended, in the passages cited, that their readers should understand that while the occupant was in fact occupant, he was also a trustee for creditors, and also for the next of kin. Comyn so interprets the decision. But this interpretation involves an inconsistency. An occupant is responsible to no one. He is himself entitled to all the bene-

(*c*) Bac. Abr. Tit. Estates for Life and Occupancy (B. 3) 1.

(*d*) Com. Dig. Tit. Estates, F. 1.

(*e*) See for instance Watkins on Conv., by Morley & Coote, 9th ed. 70, *et seq.* note. The writer has consulted many works without finding a reference to this case.

fits of occupancy(*f*). If any one could call him to account he would not be an occupant. It is just because the property is derelict, without an owner, that the first taker can hold it until a legal title arises. If the first taker, in such a case, becomes executor *de son tort*, he cannot, it is submitted, be an occupant. To call him an occupant, and at the same time, to render him liable to creditors and next of kin, is a misnomer.

There are some other considerations which must be weighed before accepting this *dictum*. We have seen that it is not every possession, either of goods or lands under lease, that will constitute the occupier a *tort* executor. Thus, if a stranger take possession of land under lease, he is not made an executor *de son tort* unless he *claims the particular estate*. His possession may not be wrongful as against "the estate" of the deceased, for he may claim the fee itself without being made executor. So in cases under *The Devolution of Estates Act*, though a stranger may take possession, he may not claim the *fee*, which is assets, but he may claim the *land*, which is for the time derelict, until an administrator shall be appointed; in which case, occupancy being a title known to the law, he ought not to be charged as an executor *de son tort*.

Again, the cases of possession of goods, and of terms of years, can never be paralleled to that of the freehold. There is no such thing as title by occupancy of goods and chattels, while there is such a thing as title by occupancy of land. There can be intermeddling with goods and chattels, there cannot be intermeddling with the land, which *demands* an occupant in order that the freehold shall not be for a moment in abeyance. If a stranger entered and claimed the fee he might well be charged as an executor *de son tort*, as he would be of a term if he entered upon leasehold land and claimed the term. But, if he entered claiming to hold as

(*f*) Bac. Abr. Tit. Estates for Life and Occupancy, (B) 2.

an occupant only, why should he be charged as an executor any more than he who enters upon land under lease claiming generally?

Finally, are creditors led to believe by such an entry that the person entering is usurping the office of an executor? If he claimed the fee, justly so. But if he entered generally and when approached referred his possession to occupancy, they would not be misled. It must be borne in mind that under *The Devolution of Estates Act*, land is not, upon an intestacy, the primary fund for payment of debts. The order of administration is not altered. Goods are still the primary, land the secondary, fund for payment of debts(*g*). And creditors are not entitled to infer from mere possession that the person in possession is usurping the functions of an executor.

It may be thought that this reasoning savours of refinement. But when we look at the purpose for which an occupant is not simply permitted, but *demanded*, by law, there is found a substantial reason. The rule that the freehold must not be in abeyance is perhaps not of as much consequence now as it once was, but the rule is just as strictly observed as ever, in that no one can by common law conveyance create a freehold estate to commence *in futuro*. And if the rule must be observed for one purpose, it must for all(*gg*).

It may be said, however, that it is an injury to "the estate" to permit such occupancy without making the occupant account for his occupation. That is begging the question. For, if the law allow occupancy, the occupant is not accountable. And again, the very difficulty arises out of there being no *person* to represent the estate. It is no fiction or refinement that the court cannot act until a representative of the estate is appointed. No matter what injury is

(*g*) *Re Hopkins*, 32 Ont. R. 315.

(*gg*) See *Savill* v. *Bethell*, L.R. (1902) 2 Ch. 523.

being done, there must be a person capable of suing or being sued before action can be taken. The same difficulty, the want of a person in whom the property can vest, creates the vacancy and leaves the land open to occupancy.

Although letters of administration do relate back to the death of the intestate for some purposes, as for injury to goods, etc., yet they do not relate back so as to interfere with a right acquired in the interval. Thus, if a sheriff seize the goods of a tenant under execution and sell them (the landlord being dead and there being arrears of rent), an administrator subsequently appointed cannot claim a year's rent under the Statute of Anne. "For relations which are but fictions in law shall not divest any right vested in a stranger *mesne* between the intestate's death and the administration"(*h*).

While the result does not seem to square with modern notions, the weight of authority, as well as of reason, seems to be against holding that a person occupying in the vacant interval should be treated as an executor *de son tort*. And if convenience could make for anything in the determination of the point, it would be against the theory; for it would hardly be possible for relatives to remain in possession of land and not do some act which pertains to the office of an executor, thus rendering them liable where they might never even suspect it.

4. *Theory That Beneficiaries are Equitable Owners.*

The third hypothesis, viz., that the beneficiaries are equitable owners entitled to possession subject to payment of debts, seems to have been excluded by a consideration of the first two. But there is some authority upon it. In *Mulcahy* v. *Collins*(*i*), the question arose in a somewhat acute form. Three days after the death of a testator, who

(*h*) *Waring* v. *Dewberry*, 1 Str. 97.

(*i*) 24 Ont. R. 441; affirmed 25 Ont. R. 241.

had devised to the defendant, a married woman, the rent of real estate and some personalty, the married woman made a promissory note, which was sued on in this action; and the question to be determined was whether her expectations under the will were separate property. Street, J., held that they were, and he remarked that "she had, under the will, a vested interest in the property bequeathed to her." On appeal to a Divisional Court, Ferguson, J., said, "It appears to me that the right of this defendant under the will of her father-in-law is at the lowest a chose in action, a right to have the estate duly administered, and the residue, after satisfying all proper demands against it, handed over to her; and assuming this to be so, such chose in action is personal property, etc." This passage is identical in its terms with an old definition of the right of one of the next of kin in the personal property of an intestate before distribution (*j*), where it was held that a son dying had a vested interest in him which passed to his brother on his death. "By 'interest' is meant a right to sue for a share after debts paid, which interest every person hath in a chose in action." And, after citing the case of a contract to supply wood, the court proceeded:—"This case is a plain proof that a man may have an interest in a chattel without property, and such an interest which gives the person a remedy to recover" (*k*). This opinion seems more accurately to express the right or interest of a beneficiary. It was not necessary for the purpose of the case (*Mulcahy* v. *Collins*) that more should have been decided than that the defendant had "property." And Mr. Justice Street's view would no doubt have been the same as that of Mr. Justice Ferguson, had the case called for a more accurate statement. It has also been held that a deed by a sole beneficiary assigning dower is not sufficient to entitle the doweress to maintain an

(*j*) *Palmer* v. *Allicock*, 3 Mod. at p. 59.
(*k*) Ibid at p. 61.

action of dower. In this case the beneficiary was an infant, but the decision was based upon the ground that the executor was the person to assign dower(*l*).

(*l*) *Allan* v. *Rever*, 4 O.L.R. 309. The nature of the title of beneficiaries will be found discussed at greater length in Chapter IX.

CHAPTER VIII.

Of Title Under the Act: Personal Representatives.

1. *Executors—Title at Common Law.*
2. *Executors—Title Under the Act.*
3. *Executors—Title by Devise.*
4. *Administrator—Title at Common Law.*
5. *Administrator—Title Under the Act.*
6. *Letters of Administration Limited to Personalty.*
7. *Letters Limited in Time.*
8. *Administrator* Pendente Lite.

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1. *Executors—Title at Common Law.*

The title of an executor, at common law, is derived from the will, and he is in constructive possession of the estate of the testator from the moment of his death; the probate is but ceremonial evidence of his right, and is necessary to enable the executor to sue, but the title is derived from the will(*m*). He may without probate do other acts than sue, such as distraining, in assertion of his right as executor, for the law knows no interval between the testator's death and the vesting of the right in the representative(*n*). As regards terms of years, an assignment, good for all purposes of title, can be made by an executor before probate, but there is not any legal evidence to prove the right to make the assignment until the probate is granted(*o*).

This, with regard to goods and chattels, and, in fact, all the personal assets, effects, rights and credits of the testa-

(*m*) Williams on Executors, 9th ed. 243, citing *Smith* v. *Milles*, 1 T.R. at p. 480; *Comber's Case*, 1 P. Wms. 768.
(*n*) *Whitehead* v. *Taylor*, 1 Ad. & E. 210.
(*o*) 3 Preston on Abstracts 147.

tor, even though they may not be bequeathed to the executor in trust, but may be specifically bequeathed. It is not, however, the bequest that gives the executor his title, but the law(*p*). And so, when it is said that he derives his title from the will, it is not meant that the property passes by virtue of a bequest, but that the nomination or appointment of an executor is an indication and selection of a person upon whom the law casts the personalty immediately upon the death of the testator, and notwithstanding any testamentary disposition thereof. "The naming of A. and B. executors is by implication a gift or donation unto them of all the testator's goods and chattels, credits and personal estate"(*q*).

2. *Executors—Title Under the Act.*

The operation of *The Devolution of Estates Act* is the same as to realty. It vests land not devised to him in the executor, by virtue of his being executor, exactly in the same manner as the common law vests the personalty in him. And so, though the title to realty may now be said to be in the executor under the will, it is not in fact the will which passes the fee to him, any more than it is the will which passes personal property to him; but it is the statute which vests it in him, because of his being nominated or appointed executor, and "notwithstanding any testamentary disposition thereof(*r*). He takes his office under the will, and the statute vests the land in him by virtue of his office. The operation of the statute is somewhat the same as the operation of the Statute of Uses, which passes the legal seisin to him who is declared to have the use.

(*p*) *Ackland* v. *Pering*, 2 M. & Gr. 937, at p. 952.

(*q*) Went. 10.

(*r*) See dictum of Robinson, C.J., as to estates *pur auter vie*, in *Gardiner* v. *Gardiner*, 2 O.S. at p. 591:—"The power of the executor or administrator over these is derived not from the administration committed to him or his character of executor, but from the statute."

It is necessary to observe this effect of the statute, because land may still be devised to executors in trust, in which case it is not subject to some of the provisions of the Act. When it is said, then, that the title of an executor to land is under or derived from the will, it must be understood in the sense that he takes by virtue of his office, which comes from the will, and that he takes, as regards time, from the moment of the testator's death. That which passes the property to him is the statute, for it operates to vest the fee in him, though there may be a specific devise to another, in spite of any such testamentary disposition. His title, then, is purely statutory. This is vividly illustrated by an English case under the Land Transfer Act, 1897, by which it is enacted that, "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." Two out of three executors proved the will (power being reserved to the third to come in and prove), and on a sale the purchaser demanded a conveyance from all three executors. Kekewich, J., held that he was entitled to it, for the statute vested the legal estate in all three executors, and not only in those who proved the will(*s*). A renouncing executor, however, would take no title.

And where a testator having property in England and in Australia, appointed certain executors as to the Australian property, and, as general executors, certain other persons, and the general executors proved the will in England, it was held that they could make a good title to the English property without the concurrence of the executors for Australia(*t*). The special executors not being entitled to pro-

(*s*) *Re Pawley & Lond. and Prov. Bank*, L.R. (1900) 1 Ch. 58.

(*t*) *Re Cohen's Executors & London County Council*, L.R. (1902) 1 Ch. 187.

bate in England, could not be considered as the personal representatives within the meaning of *The Land Transfer Act*, 1897.

The Act, as it originally stood(*u*), contained but one section relative to the general powers of personal representatives over land, namely, section 9 of the original and the present Act. That section provides that the personal representatives shall have power "to dispose of and otherwise deal with all real property *vested in them by virtue of the preceding sections of this Act*, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them." Thus, "all estates of inheritance in fee simple, and all estates held by the deceased for the life of another in any tenements or hereditaments in Ontario, whether corporeal or incorporeal," and "all real . . . property comprised in any disposition made by will in exercise of a general testamentary power of appointment," vest in the executor by virtue of the statute, and "notwithstanding any testamentary disposition"; and the executor has power to sell and dispose of the same as if they were personalty.

He is, therefore, fully invested with the legal estate, and is able to convey both the legal and equitable estates in the land from the moment of the testator's death, by a statutory title(*uu*).

"It appears to me," said Osler, J.A.(*v*), "that the plainly expressed intention of this legislation is to vest in the legal personal representatives all the real property of the deceased *as if the same were* personal property. The Act does not say it is to devolve upon them so far as it has not

(*u*) See 49 V. c. 22

(*uu*) See *Allan* v. *Rever*, 4 O.L.R. 309, where it was held that the executor was the proper person to assign dower.

(*v*) *Martin* v. *Magee*, 18 App. R. at p. 388.

been disposed of. They take it absolutely, subject to the payment of debts, and debts being satisfied it is to be distributed as personal property is distributed, except so far as it is disposed of by deed, will or other effectual disposition. If it has been disposed of by will, the personal representatives, where the debts are paid, or if there are no debts, have the bare legal estate for the devisee, as the learned Chancellor says in the judgment below."

At the time when this case was decided, there was no shifting clause in the statute, the personal representative retaining the land until he was ready to distribute, and then being obliged to make a conveyance to the person entitled. Nor was there in the statute at that date any qualification of the powers of the personal representatives. In 1891, however, a statute was passed(*w*) which by its first section(*x*) provided for the vesting of the land in the beneficiaries without conveyance at the end of a year from the death of the owner; and by its second section(*y*) enacted that "executors and administrators in whom the real estate of a deceased person is vested under this Act shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunaties are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, *and there are no debts,* no such sale shall be valid as respects such infants, lunatics or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian appointed under *The Judicature Act,* and for this purpose the official guard-

(*w*) 54 V. c. 18.
(*x*) S. 13 of the present Act.
(*y*) S. 16 of the present Act.

ian aforesaid shall have the same powers and duties as he has in the case of infants."

It would appear, at first sight, that this clause had the effect of repealing clause 9 of the original, and the present, Act, had not both appeared in the consolidated statute. It is possible to reconcile them as to infants(*z*), but they cannot be reconciled where adults are concerned, though they may be so read as to apply to different cases. Thus section 9 gives as absolute powers to the personal representatives to deal with land as they have with regard to personalty, and therefore they could sell for any purpose. But section 16, up to the year 1900, when another amendment was made, gave power to sell only when the heirs or devisees concurred in the sale, *and there were no debts*; and failing their concurrence, the consent and approval of the official guardian was necessary. Thus, if there were debts, they could sell without the consent of any one under section 9(*a*). But if there were no debts they would be obliged to ask for concurrence under section 16.

In 1900 an amendment was made(*b*), by striking out the italicized words in the above section, "and there are no debts." The result is that section 16 now applies to all cases, and the two sections are irreconcilable. Section 9 gives absolute powers of dealing with the land, while section 16 requires the concurrence of heirs or devisees, or of the official guardian in order to make a sale for any purpose. And where no concurrence can be got, apparently no order for a sale can be made under the Act(*c*), and administration would have to take place under the order of the court.

(*z*) See post. p. 146.
(*a*) See *Re Fletcher's Estate*, 26 Ont. R. 499, at p. 505.
(*b*) 63 V. c. 17, s. 17.
(*c*) *Re Fletcher's Estate*, 26 Ont. R. at p. 505.

3. *Executors—Title by Devise.*

While the Act operates to vest in executors all the land of the testator (of the estates mentioned) "notwithstanding any testamentary disposition," which implies a devise to some one other than the executor, it does not take away a testator's power to devise land to his executor in trust for purposes mentioned in his will, nor does it interfere with his right to give to his executor powers of selling, or of otherwise dealing with the lands, as by postponing the time of vesting in his devisees. The distinction between a title thus acquired by an executor, and the statutory title notwithstanding a devise, has been already hinted at(*d*).

Where the Act defines the powers of the personal representative over land, it recognizes that a title may accrue under the Act as distinct from a title by the direct operation of the will itself. Thus, where infants are interested, the consent of the official guardian to a sale by executors is necessary as to land "which *but for the preceding sections of the Act would not devolve on executors*"(*e*). That is to say, where it is the preceding sections that cause the title in the land to pass to the executor, the land vests by virtue of the Act, and the consent must be obtained. But where the land would vest, apart from the Act, that is, where the testator devises the land to the executors in trust for sale, or other purposes, such a devise is not within this section. So, where the general powers of personal representatives under the Act are defined(*f*), they are confined to lands "vested in them *by virtue of the preceding sections of this Act.*" And similar language is used in the supplementary section allowing sale for purposes of distribution of lands "*vested under this Act*"(*g*). Again, personal representatives are for

(*d*) Ante p. 3.
(*e*) S. 8, s.s. 1.
(*f*) S. 9.
(*g*) S. 16, s.-s. 1.

certain purposes to be deemed the "heirs" of a person as to land which "vests in his personal representatives *under this Act*"(*h*). The use of these expressions implies, if that were necessary, that land may still vest in an executor otherwise than by the direct operation of the Act, and that he may have powers not contained in the statute. But, apart from this implication, a man might always have devised his land in trust for sale, or for other purposes, or might have given his executors powers over it; and there is nothing in the Act to prevent a testator from so devising to executors still.

Thus, by the Land Transfer Act, 1897(*i*), it is provided that "the personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person, or to a share in his residuary estate, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy, etc., etc." In *Re Beverley*(*j*), the will contained a trust for conversion, and the question before the court was whether the executors had power to appropriate specific assets in satisfaction of shares of residue. Buckley, J., held that that power existed in the executors by virtue of their office, and that the Land Transfer Act had in no way impaired that power. *A fortiori* would their powers exist unimpaired where expressly given by the will either in that form or as trusts expressly reposed in them.

If, for instance, a testator devised land to his executor on trust to sell and convert into money and invest the proceeds, and out of the proceeds to pay, etc., it never could be contended that the executor could not retain and sell the land upon the trust. His title would not come by the oper-

(*h*) S. 10.
(*i*) 60 & 61 V. c. 65, s. 4 (Imp.).
(*j*) L.R. (1901) 1 Ch. 681.

ation of the Act, but directly by the devise. The land would, of course, be subject to the rights of creditors, but that is not a question of title. Land which thus vests in the executor by devise remains in him subject to the trusts of the will, and does not shift into the beneficiaries at the end of the year.

The use of the expression "notwithstanding any testamentary disposition" does not, it is submitted, with great respect, displace this reasoning. Ferguson, J., appears to have thought in a case of the kind(*k*), that these words should have the most comprehensive meaning, and that land would "devolve" under the Act, even where there was a devise to executors in trust to sell and invest the money. It seems, however, that these words were intended to cause the land to vest in the executor where there is a devise to another than the executor, or to vest it in him freed from trusts where the land is devised to him in trust, so that he might sell(*kk*). For if the land is devised to the executor, it cannot vest "notwithstanding the devise," unless it is intended by the Act to prevent devises from taking effect in order that the statutory powers may be exercised. But we find in the same section that the Act is to govern the disposal and distribution only in so far as the land has not been disposed of by will. In other words, debts being paid, the will is to be effectual. Now the disposition by will is full, complete and final where the land is devised to executors in trust. The land is to go no further. Others may get benefits therefrom, but not the land itself. And the sole effect of the words "notwithstanding any testamentary disposition" must, therefore, apply in such a case only to enable the executors to sell for payment of debts, if necessary. The devise to him passes the title to him, and he holds

(*k*) *Re Booth's Trusts*, 16 Ont. R. at p. 430.

(*kk*) Cf. the proviso in The Trustee Act, R.S.O. c. 129, s. 16, "notwithstanding any trusts actually declared by the testator."

it upon trust. The matter may be elucidated by supplying a devisee in trust, in addition to an executor. Thus, a devise to A. in trust for sale, etc., B. being appointed executor. Notwithstanding the devise to A., the land passes to B., the executor, by the operation of the Act. At the end of a year, if not sold for debts, it passes to A., who holds *by devise*. If the executor and devisee in trust are the same person, as if a devise is made to A. in trust for sale, and A. is appointed executor, can it be asserted that he takes *by the operation of the Act* for a year, and that at the end of a year the title changes, and A. takes *by devise*; and to prevent the operation of the will, that he must register a caution? This is not the effect of the statute, but that upon a devise to an executor upon trust, he takes directly by devise, and his powers are defined by the will, save and except that he may, if necessary, sell the land for payment of debts(*l*).

So also, if a testator should devise to his executors on trust to sell so much of his land as should be necessary, and pay all his debts, testamentary and funeral expenses, and should exonerate his personal estate from such payments, and dispose of the residue, it could hardly be contended that the executors would not take the land by the devise. And such a trust would be opposed to the statutory direction that debts should be charged ratably on the value of the realty and personalty comprised in the residuary devise and bequest.

So, also, a testator may devise his land subject to powers given to his executor. "The Act in question," said Street, J.(*m*), "is intended, as appears on its face, to aid executors and administrators to deal with the estates which are required for the payment of debts, where such aid is necessary to enable them to do so. There is nothing in it to inter-

(*l*) *Re Hewett & Jermyn*, 29 Ont. R. 383; *Mercer* v. *Neff*, Ibid. 680.

(*m*) *Re Koch & Wideman*, 25 Ont. R. at p. 267.

fere with the provisions which testators may themselves have made as to the time and manner in which their estates are to be dealt with. Where such provisions have been made by a testator, the Act may supplement, but does not detract from them, and certainly does not destroy the express directions of a will as to the time and manner of conversion, for the purpose of vesting an absolute title in a beneficiary at an earlier period than the testator intended him to have it." And so, where a testator empowered his executors to sell and convey at any time within three years after his decease, it was said, "The executor here has a power of sale under the will, and can exercise it under the will without regard to the Act"(*n*). And the power was held to be exercisable by a surviving executor. And where there is a devise to executors upon trust to sell, and one executor renounces, the powers survive and the Act does not interfere with their exercise or require a caution to be registered to retain the property in the devisee in trust(*o*).

4. *Administrator—Title at Common Law.*

The authority of an administrator is said to be derived from the letters of administration(*p*). This is to be understood in two senses, viz., as to time and as to subject matter.

As to time, it may be said that the date of the letters is the date of the commencement of the administrator's title. No property vests in him (for he is undetermined, though not indeterminable) before the grant of letters. "An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant"(*q*). Consequently, an affected

(*n*) Ibid.
(*o*) *Re Hewett & Jermyn*, 29 Ont. R. 383.
(*p*) Williams on Executors, 9th ed. 342.
(*q*) *Per* Abbott, C.J., *Woolley* v. *Clark*, 5 B. & Ald. at p. 445.

assignment by him of a term of years before the grant is of no validity(*r*). So, also, an agreement made by an executor *de son tort* to give up possession of demised premises to a landlord, does not bind him, if he subsequently takes out letters of administration(*s*). In this case it was said during the argument, by Lord Denman, C.J., "The lessor of the plaintiff had no power to make it" [the bargain]; and by Parke, J., "He was nobody at the time," and again, "You seek to conclude him as rightful administrator, by an act done before he had any right."

And a mortgage of land, made by a person who afterwards took out letters of administration to the estate of the lessee of the land, was held not to estop him as administrator(*t*).

He has not only no title, but no assenting or dissenting powers with regard to disposal of property. In *Morgan* v. *Thomas*(*u*), the plaintiff, as administrator of his father, brought trover against a sheriff, who had seized goods of the estate in the possession of the widow of the deceased, under an execution against her, before letters of administration were issued. The plaintiff at the time notified the sheriff that they belonged to the estate of his father. The court held that the title of the administrator did not relate back to the death, and that he had no power to assent to the retention of the goods by the widow. The remarks of Parke, B., are so comprehensive that they deserve to be quoted at length. "In the first place there is no evidence whatever for the jury that the plaintiff ever assented, before he took out letters of administration, to the widow's taking the property as her share of the

(*r*) 3 Preston on Abstracts, 146; *Bacon* v. *Simpson*, 3 M. & W. at p. 87.

(*s*) *Doe d. Hornby* v. *Glenn*, 1 Ad. & E. 49.

(*t*) *Metters* v. *Brown*, 1 H. & C. 686.

(*u*) 8 Ex. 302.

intestate's goods under the Statute of Distribution; because the principle is, that no consent can be implied against a person who has no power to dissent; and this principle is illustrated by the two legal maxims to which I have already referred(*v*). It is only where a man has the power of prohibiting a thing, that his omitting to exercise that power is evidence of his assent. Now, at the time the intestate's widow took possession of this property, *the plaintiff had no power to prevent her from so doing. He had no interest in the goods and no power to take them away from her* . . ., therefore, as he had no power to dissent, he did not assent by not interfering in the matter. Even supposing that he had in the most solemn manner, by an instrument under his hand and seal, assented to her doing so, it is perfectly clear from all the modern authorities, which are uniform upon the question, that she would not have thereby acquired a right to claim the property. An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled."

But even where the doctrine of relation back applies, it does not give the administrator an earlier title than the letters. "Where it is said that an administrator has some rights by relation, it is not intended that he is administrator an hour earlier than the date of the grant"(*w*). In this case articles of partnership provided that on the death of a partner, his executor or administrator might within three months elect to succeed to his share by serving a notice to

(*v*) Qui non prohibet quod prohibere potest, assentire videtur. Qui non obstat cui obstare potest, facere videtur.

(*w*) *Holland* v. *King*, 6 C.B. at p. 740, *per* V. Williams, J.

that effect upon the surviving partners. The widow of a deceased partner served such a notice within time, and afterwards took out administration and sought to confirm it; but it was held that the notice was void. And we have already seen that relations back are fictions of law and do not affect a title acquired in the interval between death and grant of letters(*x*). If an unlawful act is done before the grant of letters, the administrator may maintain trespass therefor; but if the act at the time is lawful, it does not subsequently become unlawful by relation(*y*). But if title by occupancy exists it is lawful, and the title of the administrator subsequently acquired cannot make it unlawful. And this should be peculiarly the case with regard to land, and the title to it. And so, where an intestate died on 18th October, 1900, and letters of administration of personal estate were granted to the defendant on 22nd January, 1901, and before letters of administration of her real estate were granted, on 14th October, 1901, the defendant advertised the lands for sale, to take place on 22nd October, 1901, he was enjoined from proceeding by Street, J., who said, "It is clear that at the time the defendant advertised the lands for sale he had no right so to advertise, as he was not then appointed administrator of the real estate of the deceased"(*z*).

Our system of real property law shows nothing of relation back of title. Every interest which is to take effect upon the ascertainment of a doubtful or uncertain person, and every interest which is to vest in a person not *in esse* at the time of its creation, and every interest created under the Statute of Uses to spring up on the coming into being or ascertainment of some person, or upon the happening of some event—every such interest vests at and from the time

(*x*) Ante p. 104.
(*y*) *Thorpe* v. *Shellwood*, 5 M. & Gr. 760.
(*z*) *Byer* v. *Grove*, 2 O.L.R. 754.

of the ascertainment or coming into being of the person, or the happening of the event, as the case may be. And so with an administrator. Though he may have rights which relate back, his title cannot antedate the letters.

There is what appears to be an exception to, but is really a confirmation of, this. By *The Real Property Limitation Act*(*a*), it is provided that "for the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

5. *Administrator—Title Under the Act.*

Where the grant is general or unlimited, the authority of an administrator lasts until he dies or winds up the estate. But in the case of land, the special powers given by the Act must be the guide, for it is solely from *The Devolution of Estates Act* that the powers of an administrator over land are derived.

There seems at first to have been a doubt entertained as to whether the title of a personal representative enabled him to sell for purposes of distribution as well as for the purpose of paying debts.

In *Re Mallandine*(*b*), Boyd, C., held, in the case of an intestacy, that the administrator should not sell realty for the purpose of distribution (there being no necessity to sell for the purpose of paying debts) where one of the beneficiaries, an adult, objected. In *Re Wilson & Tor. Inc. Elec. Light Co.*(*c*), Falconbridge, J., thought that it did not follow, because the administrator was a trustee for the beneficiaries after payment of debts, or where there were no

(*a*) R.S.O. c. 133, s. 7.
(*b*) 10 Occ. N. 226.
(*c*) 20 Ont. R. 397, at p. 403.

debts, that he could not sell and convey; though he expressed no opinion as to how it might be if the administrator arbitrarily endeavoured to sell against the wishes of those beneficially entitled. Subsequent to these decisions, and perhaps, in consequence thereof, a section was added to the enactment(*d*), by which the personal representatives are given as full power to sell for the purpose "not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate," provided that where heirs and devisees do not concur, the official guardian must approve of the sale.

At the present time, it is quite clear that land is to be treated differently from personalty, because it is to shift into the beneficiaries *in specie*, if not needed for the purpose of paying debts, at the end of three years. And, while the personal representative has the undoubted power to sell for the purpose of distribution, as well as for the purpose of paying debts, it may be a question whether he should do so in all cases, for the reason that the land will, so to speak, distribute itself automatically by vesting in the persons entitled without conveyance at the end of three years from the death of the testator.

The personal representative is not, in all respects, in the position of a trustee for sale. A trustee for sale has a duty cast upon him to sell; while the personal representative, who takes under the Act, has a discretion to be exercised only for certain purposes and in certain events(*e*). And so, where an administrator made a contract for sale of land subject to the approval of the official guardian, which did not require his approval, and which he did not approve of,

(*d*) 54 V. c. 18 s. 2 ; R.S.O. c. 127. s. 16.
(*e*) *Per* Osler, J.A., *Re Fletcher's Estate*, 26 Ont. R. 499.

and the land was subsequently sold for a less sum, it was held that he was not chargeable with the loss.

The powers are limited to selling for the purposes of administration and distribution, and where an executor made a contract to exchange land belonging to the estate for other land, the court refused to enforce specific performance against him, the purpose of the exchange not being either the payment of debts or the distribution of the estate. Ferguson, J., said, "I am not of the opinion that the personal representative can properly make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own; and, if there were no reasons other than those above alluded to, I should be of the opinion that this action for specific performance could not succeed"(*f*).

6. *Letters of Administration Limited to Personalty.*

But the grant of letters may be limited, either as to time or as to subject matter. Shortly after the enactment in question was passed, a practice sprang up of granting letters of administration limited to the personalty, on the supposition, apparently, that the administrator might not need the land for the purpose of paying debts, and would not be under the obligation of distributing it. But it is extremely doubtful whether the land did not even then vest in him. Though the letters of administration entitle the administrator to demand and recover all the property mentioned therein, it is not, as we have seen, the letters which vest the land in the administrator, but the statute itself. Given a personal representative, and the statute declares that the land shall vest in him. With regard to executors, we have seen that it is not proving the will which vests the land in them. It vests in all executors who do not renounce, although all may not immediately take on themselves the bur-

(*f*) *Tenute* v. *Walsh*, 24 Ont. R. at p. 312.

der of administration(*g*). The fact that they are nominated as executors by the testator suffices. So also, it would seem that the nomination by the Surrogate Court of a personal representative should be a sufficient qualification to not only enable, but require, him to take the title under the statute. In 1887, however, an amendment was made to the Surrogate Courts Act(*h*), as follows:—"A person entitled to take out letters of administration to the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate." And by section 21 of the Surrogate Courts Act, it is enacted that "probate and letters of administration by whatever court granted shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise." Similar provisions are found in sections 38 and 39 of the same Act. It seems to have been thought by the draftsman that it was by the effect of the letters that the land vested in the administrator. And in defining the powers of personal representatives in *The Devolution of Estates Act* by an amending section(*i*), the power of selling land, both for purposes of distribution and for payment of debts, is not to "apply to any administrator where the letters of administration are limited to the personal estate, exclusive of the real estate." We must take it, on the whole, as the effect of these amendments, that though *The Devolution of Estates Act* expressly states that the land shall devolve upon and become vested in the personal representative, it will only so devolve when he takes out letters of administration to the realty itself. There is a clause in the Surrogate Courts Act(*j*) which enacts that if

(*g*) Ante. p. 109.
(*h*) 50 V. c. 7, s. 34; now R.S.O. c. 59, s. 61.
(*i*) S. 16, s.-s. 2.
(*j*) S. 89.

any of the provisions of this Act shall be found to be inconsistent with the provisions of *The Devolution of Estates Act*, this Act shall be construed so as to conform in all respects with the true intent and meaning of *The Devolution of Estates Act.*" It probably means that the latter Act is to override this Act if there is any inconsisteney between them; for if on a true construction they are found to be inconsistent, they cannot be made to conform unless one overrides the other. When *The Devolution of Estates Act* states unequivocally that the land shall vest in the personal representative, and the Surrogate Court Act states that letters of administration shall have effect over all the property of the deceased in Ontario, except where they are limited to personalty, the Surrogate Courts Act clearly will not conform, or be adjusted, to the other Act, unless it is completely disregarded in that respect. But, inasmuch as the powers of an administrator, as defined by section 16 of *The Devolution of Estates Act*, are not to apply to an administrator with a grant limited to personalty, it cannot be said that the two Acts do not harmonize. For it seems that the general intent of section 4 of *The Devolution of Estates Act*, that land shall vest in the administrator, is defined or controlled by the particular intent expressed in section 16, sub-section 2, that in the case of grants limited to personalty the powers shall not apply, and the same intent is plainly expressed in the Surrogate Courts Act.

7. *Letters Limited in Time.*

Where administration is granted *durante absentia*, the administrator has all the rights and powers of a general administrator by the provisions of the Surrogate Courts Act(*k*). This apparently was the law apart from this enactment(*l*).

(*k*) R.S.O. c. 59, ss. 42, 43.

(*l*) See *Webb* v. *Kirby*, 3 Sm. & G. 333; 7 D.M. & G. 376.

Where the administration is granted *durante minore aetate*, it has been held that the administrator is a general administrator for the time being. In *Re Cope*(*m*), Sir Geo. Jessel, M.R., said, "The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him. I am of opinion that he clearly can sell for the purpose of paying the debts"(*n*). Both in the case of an administrator *durante absentia*, where by the express provisions of the Surrogate Courts Act the administrator has all the powers of a general administrator, and in the case of an administration *durante minore aetate*, it is evident that the land would vest in the administrator, who might sell it for the purpose of paying debts.

Where administration with the will annexed is granted during the absence or minority of the executor, the administrator would probably be the "personal representative" of *The Devolution of Estates Act*. It is true that according to *Re Pawley & London and Provincial Bank* (*o*), it is not the assuming of the burden of administration that vests the land in an executor, but the statute, from the fact of his being so nominated in the will. But by the interpretation clause of the *Surrogate Courts Act*(*p*), "administration" is to include "all letters of administration of the effects of deceased persons, whether with or without the will annexed." And by section 21, as we have seen, it is enacted that "letters of administration [with the will annexed] shall have effect over the property of the deceased," etc. And, by the same interpretation clause, where the grant is

(*m*) 16 Ch. D. 49, at p. 52.
(*n*) See also *Monsell* v. *Armstrong*, L.R. 14 Eq. 423.
(*o*) L.R. (1900) 1 Ch. 58.
(*p*) S. 2, s.-s. 2.

for special or limited purposes, the word "administration" has the same signification and effect. So that, whenever administration is granted by a Surrogate Court, "whether with or without the will annexed, and whether granted for general special or limited purposes," such letters "shall have effect over the property of the deceased in all parts of Ontario," except that, if limited to personalty, it will exclude real estate, under section 61.

8. *Administrator* Pendente Lite.

There are several modes in which administration *pendente lite* may be granted. By the *Surrogate Courts Act*(*q*), "Pending an action touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the court in which an action is pending may appoint an administrator of the property of the deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the property." The appointee of any court in which such an action is pending will in such a case, take the land for the time being by virtue of this clause, notwithstanding the will, where the action is to try the validity thereof; and notwithstanding the probate or letters already granted where the action is to recall or revoke them.

An administrator *pendente lite*, appointed by the High Court for the purposes defined in the order appointing him, has been held not to be a personal representative within the meaning of *The Devolution of Estates Act*, so as to entitle him to bring an action respecting land not in question in the action in which he was appointed(*r*).

(*q*) S. 56.

(*r*) *Rodger* v. *Moran*, 28 Ont. R. 275. In this case the year from the death of the intestate had elapsed, and so even a general administrator would have failed.

Where a deceased person was interested in the matters in question in an action or other proceeding in the High Court, and has no personal representative, it is provided by Rules of Court, that the court may proceed in the absence of any person representing his estate, or may appoint some person to represent the estate for all the purposes of the action or other proceeding, and the order made, and any orders consequent thereon, are to bind the estate of such deceased person in the same manner *as if a duly appointed personal representative* of such person had been a party to the action or proceeding, and had appeared therein(*s*). Such a personal representative is not such a representative as is within the meaning of *The Devolution of Estates Act*, as we have seen(*t*). Indeed, from the wording of the rule one might infer that he is not an administrator at all; for, if so, it would not have been necessary to enact that the orders of the court should bind the estate in the same manner as if a duly appointed personal representative had been a party.

Again, there is a general power in the High Court, apart from conditions, to appoint some person *administrator ad litem*, where probate of the will of a deceased person, or letters of administration to his estate, have not been granted, and representation of such estate is required in any action or proceeding in the High Court(*u*). This rule appears to be intended to give power to appoint an administrator with powers limited only to the subject matter of the action, and for the purposes of the action, and such an administrator is not such a representative as is within the meaning of *The Devolution of Estates Act*.

At first glance section 21 of the Surrogate Courts Act would seem to conflict with this. It reads, "Probate or let-

(*s*) Rule 194. See *Fairfield* v. *Ross*, 22 Occ. N. 413.
(*t*) Ante. p. 127.
(*u*) Rule 195. See *Fairfield* v. *Ross*, 22 Occ. N. 413.

ters of administration *by whatever court* granted shall . . have effect over the property of the deceased in all parts of Ontario, etc." "Whatever court" refers not to all courts of justice, but to the Surrogate Courts. This clause was originally sub-section 4 of the present section 18, which expressly deals with Surrogate Courts only; and it is now grouped with it, though separated by two other sections from it, under the heading "Jurisdiction and powers of the Surrogate Courts." And by The Judicature Act(*v*), the High Court is given jurisdiction in testamentary matters only as provided in sections 33 to 35 inclusive of the Surrogate Courts Act. These sections relate to the reference and removal of contested cases to the High Court.

(*v*) R.S.O. c. 51, s. 40, s.-s. 1.

CHAPTER IX.

Of Title Under the Act: Beneficiaries and Their Assigns.

1. *Beneficiaries Before Vesting.*
2. *Assigns of Beneficiaries Before Vesting.*
3. *Beneficiaries After Vesting.*
   - (i) *Subsequent Caution—Assigns not Affected.*
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4. *Assigns of Beneficiaries.*
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   - (ii) *Equities for Improvements.*
5. *Assigns of Beneficiaries Who Take by Conveyance.*
6. *Infants.*

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1. *Beneficiaries Before Vesting.*

For the sake of convenience those who are to take the estate after payment of debts may be denominated "beneficaries."

Having ascertained that the personal representative takes the whole interest in the land for a year(*w*), with ability to make a good title in fee simple if he has occasion to sell either for the purpose of paying debts or distributing, it might seem superfluous to enquire as to the interest of the beneficiaries during this period. But it must be concluded that, notwithstanding what has been said, the beneficiaries have some interest in the land.

Their potential ownership may best be described as a possibility coupled with an interest.

(*w*) Since 17th March, 1902, three years; 2 Edw. VII. c. 17, s. 3.

It can hardly be disputed that the beneficiaries have an interest in preventing waste and other unauthorized dealings, or the consequences of neglect by the personal representative. Yet it is clear, if the preceding analysis is correct, that they have no immediate title or ownership, for rights and remedies must not be confounded with ownership or title. Ferguson, J., described the interest of a devisee, during the three years after the testator's death, as "a right to have the estate duly administered, and the residue, after satisfying all proper demands against it, handed over to her"—which is perhaps the best definition of the actual right(*x*).

2. *Assigns of Beneficiaries Before Vesting.*

Though a beneficiary cannot make a good title to a purchaser during the three years(*y*), he has a transmissible interest. Boyd, C., pointed out that the amendment of 1891(*z*), which provides for the shifting of the land into the devisees or heirs, speaks also of "assigns" or persons in whom the land may vest at the end of the year, and so recognizes the possibility of a transmission of interest by the devisee or heir to an assign pending the year(*a*).

But if the interest is properly described as a possibility coupled with an interest, it is undoubtedly the subject of conveyance by instrument *inter vivos*, under the Conveyancing Act(*b*), is inheritable under the Statute of William IV.(*c*), and devisable under *The Wills Act*(*d*).

(*x*) See also *Cooper* v. *Cooper*, L.R. 7 H.L. at p. 65, where it is said that next of kin have a "substantial proprietorship" subject to claims of creditors.

(*y*) *Martin* v. *Magee*, 18 App. R. 384. This case was decided before the amendment by which the land shifts into the beneficiaries at the end of the year, but the principle is the same.

(*z*) Now R.S.O. c. 127, s. 13.

(*a*) *Re McMillan*, 24 Ont. R. at p. 184.

(*b*) R.S.O. c. 119, s. 8.

(*c*) R.S.O. c. 127, s. 22.

(*d*) R.S.O. c. 128, ss. 2, 10.

And, therefore, a mortgage of a beneficiary's interest, made during the year, was held to be good as to the land after the lapse of the year, under the following circumstances:—The testator died on 17th October, 1891, devising the land in question to his son with a direction to him to pay all the debts of the testator. The executors named in the will renounced. On 23rd May, 1892, the devisee made a mortgage of the lands in fee. On 28th September, 1892, letters of administration with the will annexed were granted to the plaintiff. On 8th December, 1892, an order for administration was granted, and on 18th February, 1893, the mortgagees of the devisee were brought into the Master's office under a notice to incumbrancers, and moved against the notice, on the ground that their mortgage constituted a first charge on the land, no caution having been registered. Boyd, C., said, "The Act of 1891, by speaking of 'assigns,' appears to recognize a transmission of interest pending the year, by the original devisee, and I see no good reason against holding that the mortgage was perfectly operative as between the devisee and the applicants when it was made. It became fully operative as to the land and as against the personal representatives of the testator when the year expired, in the absence of any warning that the land was needed for their purposes. I am dealing with the externals of the transaction, *i.e.*, assuming *bona fides*, good consideration, and generally fair dealing on the part of the mortgagees"(*e*).

It has also been held that, as a matter of title, in an action to foreclose a mortgage made by the deceased, the record may be complete with the general administrator as sole defendant, yet as a matter of procedure, infant children of the deceased mortgagor should be added as defendants(*f*). The observations of the Chancellor in this case

(*e*) *Re McMillan*, 24 Ont. R. at p. 184.
(*f*) *Keen* v. *Codd*, 14 P.R. 182.

indicate that the beneficiaries have, technically speaking, no title, but an interest in protecting the property from sacrifice, and so should be made parties rather as a matter of indulgence to the infants than as a matter either of right or procedure.

And where a writ was issued in a mortgage action pending the year after the death of the mortgagor, making the children and husband of the mortgagor defendants, it was held that judgment of foreclosure should be given after the expiration of the year, no caution having been registered, and the title of the beneficiaries having, therefore, accrued by the shifting of the land under the statute, though the plaintiff might have been defeated during the year if an administrator had been appointed and registered a caution(*g*).

We may take it, then, that during the year following the death, the beneficiary has no title to the land, but he has a sufficient interest, potential ownership, to entitle him to take means to protect the property as against the personal representative, or in default of the latter's doing his duty in that respect, in anticipation of its coming to him *in specie*, or in order that the proceeds of sale of the land shall not be diminished by his fault or neglect. And his right or interest may be described technically as a possibility coupled with an interest.

As soon, however, as debts are paid, the personal representative becomes a trustee for the beneficiaries, who become entitled to a conveyance(*h*), unless there is some other good reason for awaiting the shifting of the land under the statute.

3. *Beneficiaries After Vesting.*

At the expiration of a year from the death, up to 17th March, 1902, and thereafter at the expiration of three

(*g*) *Ramus* v. *Dow*, 15 P.R. 210.
(*h*) *Martin* v. *Magee*, 18 App. R. at p. 389.

years from the death, all the land not disposed of or converted by the personal representative shall be "deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators," and that, too, although probate or letters of administration may not have been taken out, "unless such executors or administrators, if any, have caused to be registered in the registry office, or land titles office where the land is under *The Land Titles Act*, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf"(*i*). In the absence of such a caution at the expiration of the year, or three years, as the case may be, the dispositions of the property contained in the will, which have been in suspense and liable to defeat by a sale by the executors, take effect, and the land vests in the beneficiaries "as such devisees," or in their assigns as the case may be; and in the case of an intestacy the land vests in the "heirs," so-called by this section, but in reality in those who would take in course of distribution as if the land were personalty, viz., the next of kin under *The Statute of Distributions*, as affected by the new provisions of this Act, and subject to dower and curtesy.

(i) *Subsequent Caution—Assigns Not Affected.*

The title of the beneficiaries is now a legal and beneficial title to the land itself; but it is still defeasible to a certain extent. By section 14 a caution may on certain conditions be registered after the lapse of the year, or three years, as the case may be, which will defeat the title of the beneficiaries, and which we shall call for the sake of convenience a subsequent caution.

(*i*) S. 13.

Before proceeding further it will be necessary to examine the effect of a caution, to ascertain the conditions upon which, and the persons as against whom, it may be procured. By sub-section 3 of section 14 a subsequent caution may be registered, provided the executors or administrators register therewith "the consent in writing of any adult devisees or heirs whose property or interest would be affected," or "in the absence and in lieu of such consent, an order signed by a High Court judge or County Court judge, or the certificate of the official guardian approving of and authorizing the caution to be registered." It must be noticed that while section 13 provides for the vesting of the land in heirs or devisees, *or their assigns*, at the end of the year, no provision is made for obtaining the consent of *assigns* to a subsequent caution. The procedure is purely artificial; if that which is required by the statute to be done is in fact done, certain results will follow, *i.e.*, the land will be again placed in the power of the personal representative. But this peculiar operation of the statute cannot be extended to cases not provided for; nothing but a re-conveyance will re-vest the land in the personal representative, unless the statute is plainly and clearly applicable. It must also be observed that the consent of devisees and heirs can be effective only in the case of those "whose property or interest would be affected," which would undoubtedly exclude assigns of the whole interest of such devisees or heirs.

Thus, the assent of a devisee after he had conveyed away his interest would clearly not be within the enactment, for his property or interest would not be affected.

(ii) *Order for Subsequent Caution in Lieu of Consent.*

The order for a subsequent caution which is authorized to be made, is so authorized "in the absence *and in lieu of* such consent," *i.e.*, the consent of adult heirs or devisees whose property or interest would be affected. If the circum-

stances are such that an effective consent could not be obtained, as if the beneficiaries had completely assigned their shares, or they had devolved upon some one else by death, then an order could not be made "in lieu of such consent." The result is that while heirs and devisees retain their property or interest, or some property or interest in the land which vests in them, at the expiration of the year, their title is a defeasible one, and the personal representative may recall the land under these conditions mentioned.

(iii) *Effect of a Subsequent Caution.*

The effect of a subsequent caution is declared to be "the same as a caution registered within the proper period from the death of the testator or intestate . . . save also and subject to any equities on the part of non-consenting heirs and devisees . . . for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators"(*j*). This extraordinary piece of drafting cannot be commended for its clearness. The registration of a caution within time is designed to *prevent* the land from vesting in the beneficiaries, and a subsequent caution cannot by any possibility have the same effect. The only intelligible interpretation to put upon this is that the powers of the personal representative shall be the same, as regards heirs and devisees and their interests, as if the caution had been registered within time. This would give him a statutory power of sale of all interest which might still be vested in the beneficiaries. Thus the caution is operative as against non-consenting heirs or devisees whose property would be affected, but apparently not against any one else. And so it may have been in the mind of the draftsman that the fee could not be revested, but that, as against the heirs and devisees whose property or interest would be affected, the effect

(*j*) S. 15.

should be the same as if the caution had been registered within time, *i.e.*, the personal representative could sell all their interest. For instance, if a devisee had mortgaged his property, the caution could not re-vest the fee; but, as against the devisee, the personal representative would have all the powers that he had before the year elapsed, viz., the power to sell the devisee's interest, or equity of redemption. This interpretation would harmonize with an interpretation that assigns are not to be affected at all, which seems, as will presently be seen, to be unavoidable. For some reason or other the draftsman seems to have purposely avoided saying that the land shall re-vest in the personal representative; and the above interpretation permits this, and yet gives him, as against the heirs and devisees and as respects their interests, all the necessary powers.

There is a saving, however, by section 15, of equities for improvements made by "non-consenting heirs and devisees" after the expiration of the twelve months, in case the lands are afterwards sold.

4. *Assigns of Beneficiaries.*

While the effect of a subsequent caution is declared to be the same as if it had been registered within the twelve months after the death, yet certain interests are saved by the section which declares this to be the effect, by the following words:—"Save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate."

As regards assigns, the interests intended to be protected by this clause are (1) the interests of purchasers for value "in the meantime," and (2) equities of persons

claiming under the beneficiaries for improvements made after the year.

(i) *Purchaser for Value "in the Meantime."*

As to class (1) the rights to be protected must have been *acquired* "in the meantime," *i.e.*, they must have originated in the interval of time denoted by the expression "meantime." The first question which arises upon this is, whether the expression "meantime" refers to the time between the death of the deceased and the subsequent caution, or between the expiration of the year (now three years) and the subsequent caution.

If the interpretation of section 14, sub-section 5, is that an order for a subsequent caution can be obtained only as a substitute for a consent, and if such consent is obtainable only from heirs and devisees, then no subsequent caution can ever be obtained as against assigns of the heirs and devisees, even if they become assigns during the year. That interpretation of section 14, as has been already remarked, harmonizes with the saving clauses of section 15, by which, where a subsequent caution is obtained, the interests of assigns are protected from its operation. If we recur again to the shifting clause(*k*), we shall find that it expressly provides for the vesting of the land in the assigns of heirs and devisees directly from the personal representative, and not mediately through the beneficiaries who have assigned. The assigns, consequently, do not take by estoppel as against their assignors, nor by mere contract entitling them to a further assurance from the beneficiaries after the year. Coupled with this is the fact already adverted to, that no provision is made for obtaining the consent of assigns to a subsequent caution, and, therefore, there cannot be an order made "in lieu of such consent." It seems clear, therefore, that if a purchaser for value from a beneficiary during the

(*k*) S. 13.

year were to be asked for a consent to a subsequent caution after the year had expired, he might well say that the Act does not provide for the consent of assigns, but only of heirs and devisees; that heirs and devisees cannot give effective consents unless their "property or interest would be affected;" that in such a case they have no property or interest, and, therefore, no consent could be given; and, finally, if no consent could be given, no order could be made in lieu thereof. And so it seems fair to assume that purchasers for value pending the year (or three years), are to be left undisturbed at the end of the year (or three years), as the statute vests the land in them at that period and makes no provision for recalling it from them. In other words, "in the meantime" means between the death of the deceased owner and the subsequent caution; and, therefore, the defeasible title of an assignee for value acquired during the year (or three years) after the death of the owner, becomes indefeasible at the end of that period, if no caution is registered within time.

Where letters probate or letters of administration have been granted within the year, it is easy to imply a consent of the personal representative to the vesting. But the statute is equally operative without an implied assent, and without even the granting of letters probate or letters of administration.

Yet section 15 implies the registering of a subsequent caution where there are in fact assigns for value, otherwise it would be idle to provide for their protection. This may occur where the assign has acquired a partial interest in the whole land of the heir or devisee, or the whole interest in part of the land. In either case the heir or devisee would still have property to be affected, and might consent to a caution, or a caution might be ordered in lieu of his consent, and the rights of the assigns for value in such cases are protected under this clause.

If the grammatical construction of the section may be relied upon, "in the meantime" naturally refers to the interval of time immediately succeeding the last point of time mentioned, and that is the death of the testator or intestate. And there is a striking contrast between the definition of time in this part of the section and that in the concluding portion, where, by precise language, only improvements made after the twelve months are saved. If the intention had been to provide in both cases for the same period of time it is more than likely that the concluding portion of the section would have contained a relative expression, such as "during the same period," or other similar words.

In *Re McMillan*(*l*), the mortgage was made during the year, and no caution was ever registered, or, as far as appears by the report, ever asked for. The right of the mortgagee, had, therefore, been "acquired" before the expiration of the year, and it was held to be a valid charge as against the land and the executors after the lapse of the year. "It became," said the Chancellor, "fully operative as to the land and as against the personal representatives of the testator when the year expired, in the absence of any warning that the land was needed for their purpose." The section now in question was referred to, but no comment was made upon what might have been the effect if a caution had been applied for or obtained after the expiration of the year. Although the case is an apparent authority for the interpretation now contended for, yet, in the absence of a subsequent caution, or an application for one, the point could not have been properly raised, and it is not, therefore, a decision upon it(*m*).

(*l*) 24 Ont. R. 181.

(*m*) See *Re Martin*, 26 Ont. R. 465, at p. 466.

(ii) *Equities for Improvements.*

Class (2) comprises the equities of persons claiming under non-consenting heirs and devisees for improvements made after the expiration of twelve months (now three years) from the death, and these equities are saved if the lands are afterwards sold by the executors or administrators. That is to say, where heirs or devisees have refused their consent, and a caution is obtained *in invitum*, the equities of persons claiming under them are preserved.

It would be curious to know what would become of such improvements if the heirs or devisees did consent to a caution—the statute not providing for that contingency.

It is difficult to see what is intended by the expression "persons claiming under" non-consenting heirs and devisees. In the prior part of the section persons "who have acquired rights for valuable consideration from or through the heirs or devisees" are especially protected, and the caution is not to affect them. They may, therefore, be excluded from the scope of the latter part of the section, for they do not require additional protection; indeed, if only their improvements are to be saved it would be repugnant to the prior part of the section which saves their whole interest. The natural consequence of this is that persons claiming under heirs and devisees, whose equities for improvements are protected, are persons who have not acquired their rights for valuable consideration, *i.e.*, volunteers, such as legal representatives, heirs or devisees of the non-consenting heirs or devisees. But if the proposition already advanced be correct, that no caution can be obtained against any assign (voluntary or for value), nor against any heir or devisee of the heir or devisee, then it could not have been intended to save the equities for improvements of either voluntary assigns or heirs or devisees. It is true that the interests of assigns for value are expressly protected in the prior part of section 15; but that enactment may have been introduced

from an excess of caution. The difficulty still remains, that while an express provision of the statute vests the land in assigns (voluntary or for value) at the end of the year, or three years, no provision is made for recalling it from assigns. If we apply this to the case of claims for improvement, it will reduce the number of those claiming under beneficiaries, whose improvements are protected, to those who have acquired but a qualified or limited interest in the property of the heir or devisee, and whose interest is acquired by voluntary transfer. This conclusion would exclude legal representatives, heirs and devisees, of the heirs and devisees of the original deceased owner. For they, being heirs and devisees of the heirs and devisees, and not heirs and devisees of the deceased owner, whose estate is in question, no subsequent caution could be obtained at all as against them. In other words, it is only when the heirs or devisees retain some property or interest in the land which has vested in them that a caution can be obtained, and in that case, if any one claiming a limited or partial interest under such heirs or devisees by voluntary transfer has made improvements, the equity therefor will be protected from the caution. But if the heirs or devisees have completely assigned their shares, or if their shares have passed by death, it seems that no caution could be obtained, and no question could therefore arise under this clause. It is true that, in order to give a greater effect to the expression "those claiming under them," it might be held that heirs and devisees survive, figuratively, in their legal representatives or heirs or devisees, and that cautions might be obtained against such representatives. But this is open to the objection that it would practically add to the statute classes of persons against whom a caution might be obtained who are not named in the statute. And in case of the question arising as to the estate of the deceased heir, his personal representative could make the claim, and he would be

within the express words of the statute, while the personal representative of the original estate is not.

This is, perhaps, not a satisfactory conclusion, but neither is the drafting satisfactory. The whole scheme of recalling the land without a conveyance, after it has once legally vested in the beneficiaries, is highly artificial and unnatural; results are produced by an observance of the procedure devised by the statute, which never could be produced but for the provisions of the statute; and it seems fair to conclude that those cases which are not expressly and unequivocally provided for by the words of the statute should be altogether excluded from its operation, and that the rights of other persons which have arisen should not be affected.

5. *Assigns of Beneficiaries Who Take by Conveyance.*

In addition to title acquired by the operation of the statute, special provisions are made for the protection of titles acquired by conveyance from beneficiaries with the assent of the personal representative during the year. By section 20 it is enacted as follows:—"Persons *bona fide* purchasing real estate from a devisee whose devise has been assented to by the executors or administrators by deed, or by writing under their hand, or *bona fide* purchasing the real estate from any heir at law or devisee to whom the same has been conveyed by the executors or administrators, shall be entitled to hold the same freed and discharged from any unsatisfied debts and liabilites of the deceased owner not specifically charged thereon otherwise than by his will, but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir at law, or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators, or permitted to become vested, to the prejudice of such creditors."

This section contains more careless drafting. Nothing is said in any other part of the Act as to the assent of executors to a devise in the sense in which an assent to a bequest is made. Nor is such an assent necessary(*n*).

Assent, deriving its sole meaning from this clause, must mean something which evidences to the mind of the devisee that the executor or administrator will not require the land for payment of debts not amounting to a conveyance, which is spoken of in the next sentence. Again, the assent of *administrators* to a devise is coupled with that of executors. This must mean an administrator with the will annexed, as the clause, thus far, deals only with the case of a devise. Again, in the final clause, which saves the rights of creditors as against the personal representatives, their rights are preserved not only in face of such a conveyance or assent, but also where the executors or administrators have *permitted* the land to become vested, although nothing is said about such vesting in any other part of the section.

That this section is intended to apply only to the case of a conveyance during the year (now three years) after the death of the owner, or to the period of currency of a caution, seems clear; for the automatic vesting is provided for by another enactment(*o*), and there would in such case be no assent or conveyance. If all the debts were paid, or if all the known debts were satisfied after such an advertisement for creditors as a personal representative ought to publish, then there should be no impediment to a distribution, even though the year, or the caution, had not expired(*p*).

In such a case, if the personal representative by deed or writing should assent to the immediate enjoyment of the

(*n*) *Per* Maclennan, J.A., *McKinnon* v. *Lundy*, 21 App. R. at p. 567.

(*o*) 2 Edw. VII. c. 1, s. 4.

(*p*) See *Re Cary & Lott*, L.R. (1901) 2 Ch. 403.

land by the devisee (which is what appears to be the meaning of assenting to a devise in this clause), or if he should actually convey to a beneficiary, who should convey to a *bona fide* purchaser, the latter is to hold the land "freed and discharged from any unsatisfied debts and liabilities of the deceased owner not specifically charged thereon otherwise than by his will." This, again, is unfortunate. Debts and liabilities are never a charge or lien on lands. A purchaser from an executor need not see to the application of his purchase money, nor need a purchaser from an heir trouble himself about debts. If there is any specific charge or lien on the land itself, such as an execution, or a mortgage, it is self-protected, so to speak. Even if debts are charged on land by a will, a purchaser buying either from an executor or heir need not see to the application of the purchase money, and, of course, would not be liable for debts.

What kind of a title is a purchaser to get under such circumstances? He is to hold the land free from such debts as are mentioned, but is he, by inference, to hold subject to such as are not mentioned? There is no positive enactment that debts are a charge on the land at all, although the land may be used for paying debts. And there is no positive enactment that where debts are charged on land by a will, the purchaser is to see that they are paid, and the best that can be said of this clause is that an inference ought not to be drawn from very obscure phrasing derogatory to the title of a purchase for value.

The enactment was entirely unnecessary. It formed part of an Act(*q*) which was passed after a decision of a Divisional Court that a devisee could make title, notwithstanding that the estate was still vested in the executors, which was afterwards reversed by the Court of

(*q*) 54 V. c. 18, assented to 4th May, 1891.

Appeal (*r*), and was intended rather to declare the intention of the Legislature than to make any alteration or supply an omission in the law.

6. *Infants.*

Where infants are concerned or interested in land, special provisions are made by the Act. As the Act originally stood, no sale could be made by the personal representative of land which, by force of the Act, vested in the executors or administrators, without the consent or approval of the official guardian. The enactment is as follows:—"Where infants are concerned in real estate which, *but for the preceding sections,* would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the official guardian of infants appointed under *The Judicature Act,* or, in the absence of such consent or approval, without an order of the High Court"(*s*). Not all land of infants is subject to this section, but only such as would not devolve on the personal representative but for the preceding sections of the Act. In other words, where it is by the effect of the Act alone that the land devolves upon the personal representative, then the official guardian must consent to any sale under the Act. That includes all cases of intestacy, because, but for the Act, the land would not devolve upon the administrator; and all cases of devise, except where there is a devise to executors in trust for the infants, or in trust for sale and to distribute amongst infants, or upon any other like trust. In such cases it is the devise which passes the land to the executors, and not the Act, and in such cases the land would have devolved upon the executors apart from the Act. In such cases, too, the sale would not be

(*r*) *Martin* v. *Magee*, 19 Ont. R. 705; decided 30th June, 1890; 18 App. R. 384, decided 12th May, 1891.

(*s*) S. 8.

"under the Act," but in fulfilment of the trust. The latter cases are not within this section, and the executor could make a good title by sale at any time without the consent or approval of the official guardian.

But in 1891 an Act was passed, one clause of which is now section 16 of the present statute; and by this section it is enacted that "executors and administrators in whom the real estate of a deceased person is *vested under this Act* shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants . . . are beneficially entitled to such real estate as heirs or devisees . . . no such sale shall be valid as respects such infants . . . unless the sale is made with the approval of the official guardian, etc."

In *Re Fletcher's Estate*(*t*), Osler, J.A., said, "It is singular that this section is not expressed to be in substitution or amendment of section 8 (1) of the former Act. That section is not, indeed, referred to, although the two are undoubtedly inconsistent, as the latter requires the assent of the official guardian in all cases where infants were interested. The effect of section 2 of the Act of 1891, is to vest in the executors and administrators, whether there are infants or not, an absolute discretion to sell the real estate for the purpose of paying the debts; and, whether there are debts or not, for the purpose also of the distribution of the estate among the persons beneficially entitled. Differing from section 8 (1) of *The Devolution of Estates Act*, the approval of the official guardian is now required only in the case of a sale for the purpose of distribution simply, and then only when there happen to be infants or non-concurring heirs or devisees. The power to obtain in such case an order of the

(*t*) 26 Ont. R. 499, at p. 504.

High Court approving the sale, failing the consent or approval of the official guardian, is not conferred by this section." With great respect for the opinion of the learned Judge, it is submitted that the sections are not inconsistent, and, since the decision was rendered, the two sections appear in the consolidated statute. It is, of course, the duty of an interpreter of the statute to harmonize them if possible, and if the distinction is borne in mind between land vesting in the executor by force of the Act, notwithstanding any testamentary disposition, and land vesting in the executors by force of the will, the two sections will be found to agree. As has already been pointed out, the original enactment applied, in terms, only to land, which, but for the Act, would not have devolved upon the executors or administrators; that is to say, it applied only to land which by force of the Act only, and notwithstanding any testamentary disposition, vested in the executors.

The later enactment(*u*) applies only to land which "*is vested under this Act*" in executors and administrators. Thus, in both sections, precise words are used to indicate that the official guardian's approval is required when the land vests in the personal representatives under the Act. Under the earlier enactment, it has been held that where land was devised to the executors in trust to sell, the proceeds to be invested for infants, the official guardian's consent to a sale was not necessary(*v*). It cannot have been intended that the later enactment was designed to interfere with such a case, and, when there is an imperative duty cast upon devisees in trust, to require the official guardian's consent before the trust could be carried out.

The matter may be further tested in this way:—A devise to X. in trust for sale and to distribute amongst infants, and

(*u*) S. 16.

(*v*) *Re Booth's Trusts*, 16 Ont. R. 429; and see also *Re Koch & Wideman*, 25 Ont. R. 262.

until sale to receive the rents and profits and apply them for the maintenance and education of the infants; appointment of A. and B. executors. It seems clear that the land would vest in A. and B., executors, *under the Act*, notwithstanding the testamentary disposition. But the infants are interested, and, therefore, under section 8 (1) the consent of the official guardian would be necessary to a sale. But if the executors did not require the land for debts, could it be argued that they could sell at all for the purpose of carrying out the trust which *ex hypothesi* had not been confided in them? And if the land shifted into or was conveyed by them to the trustee, X., would the official guardian have anything to do with it? It seems to be reasonably clear that where there is a devise in trust, whether to executors or other devisees in trust, section 16 (1) does not apply, because the land does not vest *under the Act*.

Nor (having regard to the wording of the earlier enactment referring to the vesting of land, *under the preceding sections of the Act*) can it have been by inadvertence that in the later enactment similar words were introduced which limit its effect to land *vested under this Act* in the executors.

If, then, we treat both clauses as referring only to land which, by force of the Act only, vests in the personal representative, and which would not have vested in him but for the Act, then the consent of the official guardian required by both sections must be procured only in such cases. And if we read the concluding portion of section 16 (1) in this light, it is evident that the consent which is required is the consent formerly spoken of.

CHAPTER X.

CAUTIONS.

1. *Definition.*
2. *How signed.*
3. *Operation of a Caution.*
4. *Successive Cautions.*
5. *Subsequent Cautions.*
   - (i) *Conditions for Subsequent Caution.*
   - (ii) *Consent, by Whom Given.*
   - (iii) *Want of Capacity.*
   - (iv) *Order for a Caution.*
     - (a) *How Signed.*
     - (b) *Where Wrongly Made.*
     - (c) *Evidence on Application for Order.*
6. *Successive Subsequent Cautions Cannot be Obtained.*
7. *Withdrawal of Cautions.*

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1. *Definition.*

A caution is a warning that the land described in it may be required to be sold by the executors or administrators in the fulfilment of their powers and duties(*vv*).

2. *How Signed.*

It must be signed by "such executors or administrators;" it must be "under their hands;" the execution must be proved by affidavit in the manner prescribed by the Registry Act; and the caution must be registered in the proper registry office before the expiry of a year (now three

(*vv*) See Chapter IX., as to the effect of cautions upon title.

years) from the death of the deceased owner. If this is done, the section of the Act which declares that the land shall vest in the beneficiaries at the end of the year, or three years, does not apply to the land described in the caution(*w*). As the land vests in all the executors, whether they all prove the will or not (*x*), and as they must all join in making a conveyance, they should all join in signing the caution. In the case of administrators with the will annexed and general administrators the same particularity must be observed. Even if executors did not prove the will at all the land would vest in them by virtue of the statute, and there is no reason why they should not exercise the right in anticipation of proving the will. But if in such a case they did not afterwards prove the will, they might become executors *de son tort*. As was pointed out in the case just cited, the executors are to take irrespective of the question whether they have obained a grant of probate or not, and there is insuperable difficulty in holding that it vests only in the executors who have proved, to the exclusion of those who have not proved, unless the latter have renounced.

An administrator, however, is not an administrator until he has obtained his letters, and no caution signed by a person who is afterwards appointed administrator would be effectual.

3. *Operation of a Caution.*

The decision of the executors or administrators to register a caution within the year, or three years, is purely arbitrary, and depends upon their apprehension, whether well founded or not, as long as it is honest, that it *may* be necessary for them to exercise their powers respecting the land.

(*w*) S. 13 (1).

(*x*) *Re Pawley & Lond. and Prov. Bank*, L.R. (1900) 1 Ch. 58; ante, p. 109.

The caution operates to prevent the land from vesting for twelve months from the registration of the caution. The Act goes on to say (*y*) that it shall not apply for twelve months from the last of *such* cautions if more than one are registered. No provision is made for the registration of more than one caution during the year by this section, and the clause plainly refers only to *such* cautions as are registered within the year. It cannot refer to several cautions respecting different parcels of land, for the registration operates upon the land only which is contained in the caution. And at the time this enactment was passed (*z*), there was no such thing as a subsequent caution; and it will be seen that after a subsequent caution has been registered no further caution can be registered. Nor does it refer to the case of a second caution registered before the expiration of the first, for that is provided for expressly by another section (*a*). The meaning of the phrase is entirely obscure.

4. *Successive Cautions.*

Before the caution expires another caution may be registered, "and so on from time to time as long as the executors or administrators consider such action necessary, and every such caution shall continue in force for twelve months from the time of its registration" (*b*).

5. *Subsequent Cautions.*

If, however, the personal representatives have omitted to register a caution within the twelve months, now three years, they may still do so, upon terms and conditions set out, and as against the interests of certain persons described (*c*).

(*y*) S. 13 (1) *ad fin.*
(*z*) 54 V. c. 18, s. 1 (1).
(*a*) S. 13 (6).
(*b*) Ibid.
(*c*) S. 14.

And this may be done although probate or letters of administration have not been granted within the year, or three years, after the owner's death (*d*).

(i) *Conditions for Subsequent Caution.*

The conditions under which a subsequent caution may be registered are as follows (*e*) :—The personal representatives must register—

1. An affidavit of verification, as required by s. 13;

2. An affidavit "stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be) under their powers and in fulfilment of their duties in that behalf";

3. "The consent in writing of any adult devisees or heirs whose property or interest would be affected";

4. An affidavit verifying such consent; or

5. "In the absence and in lieu of such consent, an order signed by a High Court Judge or County Court Judge"; or

"The certificate of the official guardian, approving of and authorizing the caution to be registered, which order or certificate the Judge or official guardian may make with or without notice, on such evidence as satisfies him of the propriety of permitting the caution to be registered."

Nothing need be said as to the affidavit of verification.

The affidavit of belief will be sufficient if the heirs or devisees whose property or interest would be affected consent in writing to the registration of the caution. But if no such consent is obtained, and an order is asked for, further evidence must be given, as will presently appear.

(*d*) *Re Martin*, 26 Ont. R. 465; 2 Edw. VII. c. 17, s. 4.
(*e*) S. 14.

(ii) *Consent, by Whom Given.*

The personal representatives are not entitled of their own motion to register the caution. The land having vested in the heirs or devisees, the consent of those whose property or interest would be affected, must be obtained. It would seem to follow that it is only when some property or interest in the land of the deceased is in an heir or devisee at the time a caution is applied for that it can be obtained. For, as it is a condition, or proviso, that they shall obtain the consent expressed in the statute, then, unless the conditions are such that it is possible that such consent could be given, the statute is not operative. Again, the heirs or devisees can only consent when their own property or interest would be affected, and if they have no property or interest, the consent cannot be given. Therefore, an assign, either in fact or in law, cannot be asked for a consent, nor would it be effective, if given, as it is not provided for by the statute. Consequently, if an heir or devisee should die, his heir or devisee could not consent; for he is an assign only of the heir or devisee; or, in other words, he is the heir or devisee of the heir or devisee, and not the heir or devisee of the deceased person whose estate is being administered. And the interests of the estate of the deceased heir or devisee would have to be taken into account.

If an heir or devisee should mortgage the land, or lease it, he would retain an interest, and would be capable of giving a consent as to his own interest; but the interests of mortgagee or tenant would be exempt from the caution.

But if an heir or devisee should make a contract for sale of his portion of the land, it is probable that a caution would not affect the land. In such a case the purchaser would be entitled to demand a conveyance of the land itself on complying with the terms of the contract; and if he should complete, the purchase money would not be subject to the

caution in the hands of the heir or devisee. In such a case the provisions of the late statute (*f*) would apply.

But, if the contract of sale went off, so as to restore the heir or devisee to his original position, no doubt he would be in a position to consent to a caution.

(iii) *Want of Capacity.*

The provision for obtaining a consent implies a capacity in the heir or devisee to give the consent, and therefore infants and persons of unsound mind are not within the effect of this clause, and no subsequent caution could be obtained as against their interests.

Neither could a consent be obtained from a non-existent person as an executory devisee not yet ascertained.

Nor, it is apprehended, could a devisee in tail give a consent, at any rate for more than his own interest, for the property is not his, and he cannot defeat either the issue or reversioner unless he complies with the provisions of the Act respecting assurance of estates tail. And if he barred the entail, it is apprehended that he still could not consent, for the interest which he obtains thereby is not that which vested in him under the Act.

(iv) *Order for a Caution.*

If no consent is obtained the only alternative is to apply for the order of a judge or the certificate of the official guardian. It seems to be the result of this clause that no such order or certificate could be granted except in a case in which a consent might have been given. It is not necessary that a consent should have been refused, for the order is to be granted "in the absence" of the consent. But it is also to be in lieu of it; and, therefore, where the consent could not be given, the order cannot be made. The phrase is "in

(*f*) 2 Edw. VII. c. 1, s. 4.

the absence *and* in lieu of such consent;" both must concur. If the statute had read—"in the absence *or* in lieu of a consent," it might have been argued that the phrase "in lieu of" referred to cases where the consent might have been, but was not, given; and that the phrase "in the absence of" referred to cases of there being no consent from any cause whatever. But the phrase is conjunctive, not disjunctive. And even if the phrase "in the absence of consent" stood alone, it would imply the possible existence of a consent, and therefore the existence of persons able to consent; but would hardly include cases where no consent ever could be given. Where there is no consent, the order may be made in its place or room or stead; but, where a consent is not authorized, and therefore cannot be given, no order can be made in lieu of it. If this reasoning is sound, it follows that no order can be made when the heir or devisee is an infant or of unsound mind. The official guardian does not act under this clause for or on behalf of infants, but as a substitute for a Judge, and only where adult heirs or devisees do not consent.

It is true that by section 16 the official guardian is given power to approve, on behalf of infants and lunatics, of sales by executors and administrators—but only of the sales of land vested in the executors or administrators under the Act. And where the land has passed from the executors or administrators to an infant or lunatic, there seems to be no way of revesting it in the personal representative.

So also, if the land is put in settlement by the will, as if it be devised to A. for life, remainder to A.'s eldest son in tail, and in default of issue to A.'s second son in tail, and so on, remainder in fee to the right heirs of the testator, and A. is unmarried, or has no son, at the death of the testator, it is plain that there are non-existent persons interested in the property, and no consent could be obtained to re-vest the fee simple in the personal representatives, and therefore

no order could be made. In this case there is an additional reason for not acting, as the application for an order is to be made with or without notice; and the possibility of giving a notice must exist. In the case of the vesting of an estate tail by shifting under clause 13 of the Act, as on a devise to A. and the heirs of his body, it is hardly possible that a Judge should undertake to bar the entail and defeat the tenant's issue by an order, in the face of the Act respecting assurance of estates tail.

Again, if land were devised to A. for life, and from and after his death to the first son of A. who should attain twenty-one years of age, and the remainder so devised were still contingent at the time of shifting, no proper consent could be given, and no order could be made. The clause as to subsequent cautions seems to be framed for the simple case of a devise in fee simple, or for such estates as consents could be given for.

(a) *How Signed.*

The jurisdiction which the Judge exercises under this clause seems to be personal, and not the ordinary jurisdiction of his Court. And the order must be signed by the Judge himself, and not by the registrar or clerk of the Court or clerk in chambers. Where an order for a *capias* was signed by a Judge, it was held to be void on account of a rule which required that "all orders made by a Judge of the High Court in Chambers in Toronto shall be signed by the clerk in chambers" (*g*).

Conversely when a statute directs that an order shall be signed by a Judge, the signature by some one else will not suffice (*h*). Indeed, if the matter is not a proceeding in Court there is no pretence for the registrar or clerk to sign

(*g*) *St. Croix* v. *McLachlin*, 13 P.R. 438.
(*h*) See and cf. R.S.O. c. 164, s. 18.

at all, and where the official guardian is applied to, plainly no one could sign the certificate but himself.

(b) *Where Wrongly Made.*

So also, there would be no appeal for similar reasons. And if an order were made without jurisdiction and registered, it would be necessary to bring an action to remove the cloud from the title. For if signed by a Judge, he would be *functus officio* from the moment of signing, having done all that the statute authorizes him to do. There is no proceeding in Court without the institution of an action; and no power is given to him to review his own action or to set aside his own order. This seems to be abundantly clear when it is considered that the certificate of the official guardian is equivalent to an order. If such a certificate were given without jurisdiction and registered, the official guardian certainly could not remove the cloud on the title. And no application could be entertained by the Court to remove it without bringing an action.

(c) *Evidence on Application for Order.*

When an order for a caution is applied for the executors or administration must produce more evidence than their affidavit of belief. Assuming the jurisdiction to make the order, the Judge must also be satisfied of the propriety of making it, and must be so satisfied on evidence. In particular, it should be shewn what, if any, interest has been acquired by third persons since the vesting in the heir or devisee; otherwise those persons whose interests so acquired are protected would have a cloud cast on their title if the order affected to deal in general terms with the land.

The order or certificate may be made with or without notice—presumably to such persons as might have been asked for their consent.

6. *Successive Subsequent Cautions Cannot be Obtained.*

The only condition upon which a subsequent caution can be registered upon consent or order is if the executors or administrators have (a) omitted to register a caution within the year (now three years) "as provided by the *preceding* section;" or (b) having registered one within the year, have omitted to register a second caution "as required by the *said section*" before the first expired, or a third before the second expired, and so on.

But where a subsequent caution has been obtained on consent or order, and expires, there is no provision for obtaining another one. Indeed, it may well be doubted whether, if a subsequent caution is obtained on consent or order, the executors or administrators can within the twelve months of its currency register another so as to retain the land. It is true that it is declared by section 15 that a caution registered by consent or order "shall have the same effect as a caution registered within the proper time (*i*) from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights, etc." But this is only as to the interests affected by the caution; it does not purport to give to such a caution all the effects of a caution registered within time. It is true that by a very liberal interpretation "the same effect" might include the effect which a caution in time has of enabling the personal representative to retain by another caution as against the person affected the land secured by a caution already registered. But is extremely doubtful whether a liberal or inferential interpretation can be given to a statute of this kind, and whether its purely artificial operation can be extended beyond its bare words. The application for a subsequent caution would in general indicate that a use for the land had been discovered, and that immediate action should be taken respecting the land.

(*i*) 2 Edw. VII. c. 17, s. 11.

7. *Withdrawal of Cautions.*

A caution registered within the year from the death, or a caution registered before the expiry of an existing caution, may be withdrawn during its currency by filing a certificate withdrawing the whole land or any parcel specified in the certificate of withdrawal. The certificate must be signed by all the executors or administrators. It must be verified by the affidavit of a subscribing witness in the following form, or to the like effect:—

"I, G. H., etc., make oath and say: I am well acquainted with A. B. and C. D. named in the above certificate; and that I was present and did see the said certificate signed by the said A. B. and C. D.; that I am a subscribing witness to the said certificate and *I believe the said A. B. and C. D. to be the persons who registered the caution referred to in the said certificate*" (*j*). There is a striking difference between this affidavit and that required for verification of the caution itself. The latter is a mere affidavit of execution. But the form of affidavit of verification of the certificate of withdrawal seems to require or indicate that no one can withdraw a caution but the identical persons who registered it. If an executor should die, or be removed; or if all the executors died or were removed, or permitted to retire, the affidavit could not be made. It would not be "to the like effect" if the witness were obliged to swear that the persons signing the certificate of withdrawal were *not* the persons who signed the caution but some others. This would be the direct opposite of the substance of the affidavit in that respect, and not to the like effect. No doubt the Legislature had some object in so precisely providing for identity of persons registering and withdrawing a caution; but it is difficult to see what it is. For the conveyancer it is sufficient that he follow the statute implicitly.

(*j*) S. 13, s.-s. 5.

The right of withdrawal of a caution is strictly limited to those which are registered within time. There is no power to withdraw a caution which is registered after the time upon consent or order. The executors or administrators are authorized to withdraw a "caution mentioned in the *preceding sub-sections*," *i.e.*, a caution registered within the year (now three years), or a succession of such cautions "if more than one are registered."

It is one of the curiosities of the drafting of this statute that, whereas the caution is directed to be registered in the registry office of the territory in which the land lies, the certificate of withdrawal is to be "filed." Where it is to be filed, and what is to be its effect when filed, is left entirely to inference.

Presumably it is to be filed, perhaps registered, in the registry office in which the caution was registered. And presumably also its effect when filed is to permit the land to vest in the heirs or devisees. But the statute says nothing on the subject.

CHAPTER XI.

Powers of Executors and Administrators.

1. *Powers Under Original Act.*
2. *Restrictions on Original Powers.*
3. *Infants and Persons of Unsound Mind.*
4. *Non-concurring Heirs and Devisees.*
5. *Effect of a Sale by Personal Representatives.*
6. *Sale Where Beneficiary Receives His Share.*
7. *Sale Where Debts are Paid Out of Purchase Money.*
8. *Powers of Mortgaging and Leasing.*

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1. *Powers Under Original Act.*

As the Act originally stood, there was no necessity to enquire into the powers of personal representatives over lands. For section 9 declared, and still declares, that they shall "have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in them." As the fee vests in the personal representatives under the Act, irrespective of any settlement created by the will, and as the powers of personal representatives over personalty are well defined, no further definition of powers was necessary, unless to increase or diminish those already given.

2. *Restrictions on Original Powers.*

By an amending Act passed in 1891(*k*), further provisions were made as to sales by personal representatives,

(*k*) 54 V. c. 18, ss. 2, 5.

which are now sections 16 and 19 of the present statute. The former reiterates the power to sell and convey for the purpose of distributing as well as paying debts, but adds a proviso that where infants or lunatics are beneficially entitled as heirs or devisees, or where other heirs or devisees do not concur in the sale, no sale shall be valid as respects such infants, lunatics or non-concurring heirs without the approval of the official guardian. The latter section enacts that persons *bona fide* buying land from personal representatives "in manner authorized by this Act," shall hold it free from debts or liabilities not specifically charged thereon otherwise than by will, and free from all claims of heirs and devisees, without liability to see to the application of the purchase money.

Still another clause was enacted(*l*), which validated prior sales by personal representatives as to any person beneficially entitled who had received or afterwards should receive his share of the purchase money.

And still another enactment(*m*) extends the principle of the latter enactment to all such sales as took place before the date of its passing, viz., 17th March, 1902.

And yet again, another enactment(*n*) enlarges the powers of executors and administrators by enabling them to lease and mortgage lands. There are thus, in fact six, in principle five, enactments respecting the powers of personal representatives to deal with lands. The first gives general powers, such as are possessed over personal estate. The second prevents a sale where the heirs or devisees do not concur (leaving out of consideration for the present the special cases where lunatics and infants are interested). The third declares the sale by the personal representative under the Act to free the land from the claims of heirs and

(*l*) Now s. 18.
(*m*) 2 Edw. VII. c. 17, s. 7.
(*n*) 2 Edw. VII. c. 17, s. 5.

devisees. The fourth makes the sale good as to those heirs or devisees who subsequently receive their shares of the purchase money. And the fifth gives the extraordinary powers of leasing and mortgaging.

The ninth section of the Act gives the fullest powers of dealing with the land. "Dispose of and otherwise deal with all real property vested in them" is the phrase used in the enactment, "with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in them." All subsequent enactments must either increase or diminish these powers, and the purport of all of them, except the last, is to diminish them by restrictions placed thereon.

3. *Infants and Persons of Unsound Mind.*

Section 16, in its first part, is merely a substantial re-enactment of section 9. But the proviso makes a sale void (or declares that no sale shall be valid) as to infants, lunatics and non-concurring heirs, (1) "where infants or lunatics are beneficially entitled to such real estate as heirs or devisees"; (2) "or where other heirs or devisees no not concur in the sale"(*o*); unless in either case the sale is made with the approval of the official guardian.

First, to ascertain what cases the proviso applies to; and then, to ascertain what its effect is in those cases. The words "where infants or lunatics are beneficially *entitled* to such real estate," in reality include only those cases where *all* the heirs or devisees of the particular lands are infants or lunatics. Comparing this expression with section 8, by which the consent of the official guardian is required "where infants are *concerned* in real estate," this is very apparent; but as to whether or not it would be so construed ju-

(*o*) As the enactment was originally passed there followed here—"and there are no debts." These words were struck out by an amendment made in 63 V. c. 17, s. 17.

dicially, no opinion is hazarded. It is quite possible, however, that the intention(*p*) was to leave cases where there are some infants and some adults to be dealt with under the combined effect of sections 8 and 9, and to permit the personal representative to sell at his own discretion, under section 9, as against adults; upon getting the approval of the official guardian, under section 8, as to infants. No more, however, can be said in favour of such an interpretation than that it is an effort to harmonize enactments which are otherwise hopelessly inconsistent in some respects.

4. *Non-concurring Heirs and Devisees.*

The other case, that of non-concurring heirs or devisees, is subject to a similar criticism, viz., that that part of the clause applies where all the beneficiaries are capable of concurring and they, or some of them, do not concur in the sale.

Whatever may be the true interpretation of this section, it is perfectly clear that no well-advised purchaser would in any case accept a title without the consent and approval of the official guardian, if there were a lunatic or an infant interested, or a single "other" beneficiary who did not concur in the sale.

For practical purposes, it may be concluded that where a lunatic or infant is interested in the land proposed to be sold, even though others are also concerned, the approval of the official guardian must be obtained, otherwise the sale is not valid.

Where no lunatics or infants are interested, but all the beneficiaries are *sui juris*, or in any case, where persons *sui juris* are interested, it seems clear that in every such case where a personal representative attempts to sell he must obtain the concurrence of all the beneficiaries in order

(*p*) Treating the intention as the mere effect of the words and not as the purpose of the draftsman, which it is difficult to surmise.

to make a valid sale. It is not only in cases where the heirs or devisees *refuse to consent* when asked, that the official guardian is to be asked to give his approval to the sale; but in all cases where the heirs or devisees "do not concur," whether they are asked or not. The expression "concur" is probably borrowed from conveyancing practice. Many cases will readily present themselves in which a purchaser may demand the concurrence of persons interested, although they have not, in fact, a title. And this is a parallel case.

Thus every purchaser from a personal representative is entitled at once to ask for the concurrence of the heirs and devisees who are *sui juris*, and if it is not furnished, then to decline to carry out the sale, unless the official guardian approves. It would be no answer to say that a beneficiary could not be found, or was not known, or that the expense involved in getting his concurrence would be too great. The mere want or absence of his concurrence is a fatal objection to the sale unless the approval of the official guardian is substituted.

Another difficulty here presents itself, one which appeared in dealing with the obtaining of consents to subsequent cautions, viz., where the land is devised to a devisee in tail; or where it is devised in settlement; and there are persons alive who take a limited or qualified interest only, and others yet unborn, who, if born, would some day take an interest; or where land is devised to a person not yet ascertained, or to an ascertained person upon the happening of an uncertain event which has not yet happened—in all these cases no concurrence could be obtained; and if the circumstances are such that concurrence could not be obtained, would there be any right to sell even with the approval of the official guardian?

The enactment postulates the possibility of a concurrence being given, and where the conditions are such that

no concurrence could be procured, has the official guardian any jurisdiction to substitute his concurrence?

If not, then the land would be unsaleable. A benevolent and generous interpretation of this clause might be that it is not limited to cases where the official guardian's approval is sought to be substituted for a concurrence, possible to be obtained but not obtained, but extends to all cases both of want of concurrence when concurrence is possible, and cases where concurrence is impossible; as, where it is impossible to obtain the concurrence of a devisee, because he is not yet in being, or is not yet ascertained, or may never succeed on account of the not happening of a contingent event, or cannot be found, or where the expense would be great.

But until this is settled by judicial decision as against an unwilling purchaser, the enactment will remain somewhat obscure.

It seems, therefore, that, giving the most generous interpretation to sections 9 and 16, no sale of land can be effected by a personal representative unless all persons beneficially entitled and *sui juris* concur in the sale. And if there are any who do not concur, or if there are any infants or lunatics who are beneficially entitled, the approval of the official guardian must be obtained.

A somewhat curious amendment was made in 1902 to this section(*q*), where executors and administrators are declared to have power to divide the estate amongst the persons entitled "with the concurrence of the persons beneficially entitled thereto"! And where there are infants, lunatics or non-concurring heirs or devisees, the official guardian must approve. In other words, the executors cannot carry out the will, nor the administrator distribute according to law, without the concurrence of the persons entitled, or without the approval of the official guardian in the cases mentioned.

(*q*) 2 Edw. VII. c. 17, s. 8.

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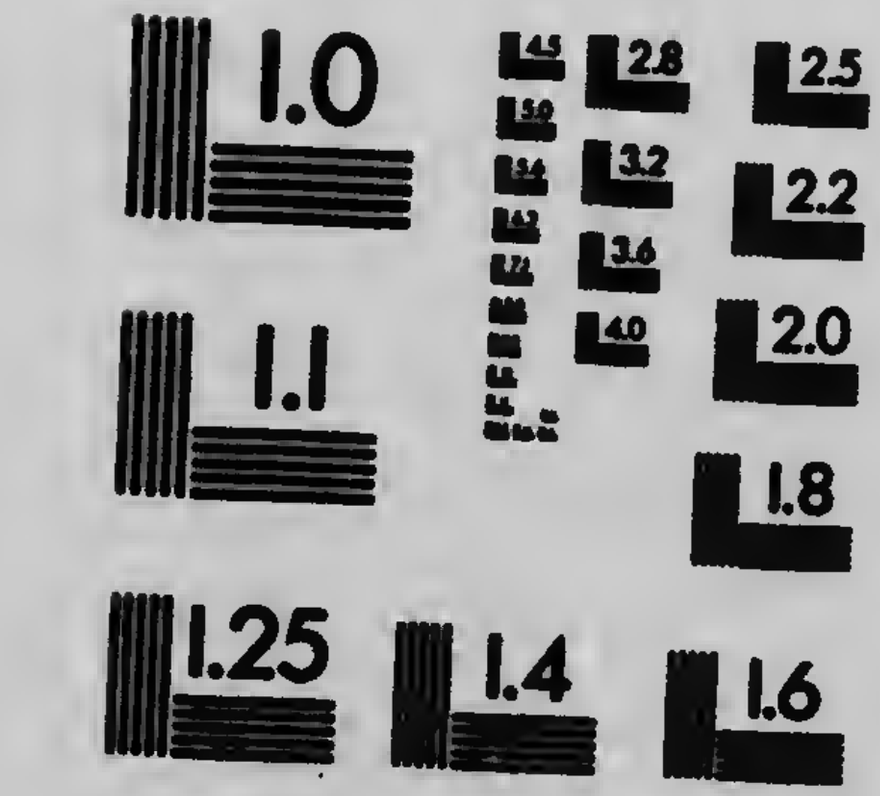

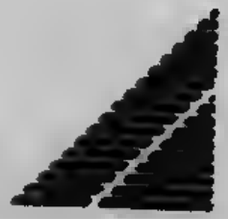

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Section 19, strictly considered, is in one sense a mere truism. It enacts that persons *bona fide* purchasing land "from the executors or administrators of a deceased owner *in manner authorized by this Act*" shall hold free from debts and from the claims of the heirs and devisees. As the Act authorizes a sale for the purpose of paying debts, it would follow as a natural consequence that a purchaser should take free from debts. And as section 16 requires the concurrence of the heirs and devisees in the sale, the purchaser would also naturally take free from their claims where they, or their substitute, the official guardian, concurred in or approved of the sale. The gist of the section, in this view, is the qualification contained in the words "in manner authorized by this Act," which requires a strict observance of the artificial conditions laid down by section 16.

5. *Effect of a Sale by Personal Representatives.*

In another sense section 19 is not a truism, but seeks to define the nature of the purchaser's title. He shall hold free from "any debts or liabilities of the deceased owner not specifically charged thereon otherwise than by his will." This phrase is referred to more at length in dealing with section 20. It is probably equivalent to "except such as are specifically charged thereon by some means other than his will."

6. *Sale Where Beneficiary Receives His Share.*

Section 18 of *The Devolution of Estates Act*, and section 7 of the recent Act(*r*), provide that where a sale has been made, and no infant in concerned, and no consent or approval of the official guardian has been obtained, but the person or one of the persons beneficially entitled has received and accepted, or shall receive and accept his share of the

(*r*) 2 Edw. VII. c. 17.

purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person. Many sales were made before 1891(*s*) by personal representatives alone which were undoubtedly valid, as there was no restriction upon the right of the personal representative to sell, no approval of the official guardian being necessary, nor any concurrence of adult beneficiaries, and the first enactment, instead of confirming such sales, threw a doubt upon their validity by declaring them to be valid only as respects those adults who might have accepted their shares of the purchase money. Since 1891, however, the concurrence of the heirs or devisees or the approval of the official guardian, has been necessary, and if not obtained a doubt is cast upon the sale except as to the interest of those beneficiaries who have accepted their shares of the purchase money. The clause instead of affording protection to a purchaser casts a doubt upon his title.

7. *Sale Where Debts Are Paid Out of Purchase Money.*

It is a singular oversight that no provision has been made for validating such sales when the purchase money has been applied in payment of debts, and the consequence is that in such a case the purchaser who has paid his purchase money, and whose purchase money has been properly applied in payment of debts, may have a bad title. The heirs or devisees cannot accept their shares, for they have none if the money has been exhausted in paying debts, and cannot confirm the sale except by deed, and the only recourse of the purchaser seems to be to get the approval of the Court on equitable grounds in an action by the beneficiaries to question the sale under section 6 of the recent Act, and section 17 of *The Devolution of Estates Act*, or to await the lapse of time to perfect his title.

(*s*) The year of the first of these enactments.

It is also singular that no provision is made by the sections under consideration for the case where a lunatic is entitled.

8. *Powers of Mortgaging and Leasing.*

Finally, executors and administrators are, by section 5 of the recent Act, given the power of mortgaging and leasing for the purpose of paying debts. The written consent or approval of the official guardian to a lease or mortgage is required "under the like circumstances as it would be required if the land were being sold"; but nothing is said as to whether the lease or mortgage can be made with or without the concurrence of the beneficiaries. It would not be wise for a lessee or mortgagee to accept a lease or mortgage without the concurrence of adults.

Section 6 validates leases and mortgages made before the passing of the Act with the approval of the official guardian, as respects all the heirs and devisees for or on behalf of whom the consent of the official guardian has been obtained.

CHAPTER XII.

ADMINISTRATION.

1. *Early Opinions on the Act.*
2. *The Present Rule—Intestacy.*
3. *Testacy—No Residuary Disposition.*
4. *Land Appointed Under Powers.*
5. *Testacy—Residuary Disposition.*
6. *Unexecuted Powers.*
7. *Incumbered Land.*
8. *Retainer.*

All such property as is affected by the Act becomes vested in the personal representatives, upon death of the owner, "subject to the payment of his debts"(*t*). "The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts"(*u*).

The enactment of two different sections respecting the application of property to the payment of debts, one of them applying only to a special condition of affairs, indicates that in different circumstances different rules shall apply. If it had been the intention to make a common fund of realty and personalty for the payment of debts by section 4, it would not have been necessary to repeat the enactment in section 7 for ratable application of a residue of realty and personalty, or conversely if it had been the inten-

(*t*) S. 4, s.-s. 1.
(*u*) S. 7.

tion that the particular rule laid down should be general, it would have been so declared in section 4.

It appears, therefore, that there are several distinct conditions, according to which one or other of the rules of administration will apply, viz.:—

(1) Intestacy;

(2) Testacy, where there is no residuary disposition;

(3) Testacy, where there is a residuary disposition;

(a) Including both realty and personalty;

(b) Including either realty or personalty exclusively.

And yet there has been a good deal of fluctuation of opinion upon the matter.

1. *Early Opinions on the Act.*

Intestacy. At first it was suggested that the purpose of the Act was to create one fund for the payment of debts, constituted of the massed realty and personalty. "The effect of the Act," said Boyd, C.(*v*), is to abolish the distinction between real and personal property for the purpose of administration, and to devolve the whole estate upon the personal representative." But the case did not call for a decision upon the point. Administration of estates went on in practice as before, the personalty being resorted to as the primary fund for payment of debts; the realty being left untouched unless and until the personalty was exhausted without satisfying all the liabilities of the estate. Agan, in *Tillie* v. *Springer*(*w*), the same learned judge said, "The distinctions once existing between the administration of real and personal estate, if not now annihilated, are so minimized as not to be of practical importance in the solution of such questions as arise in this action"(*x*).

(*v*) *Re Reddan*, 12 Ont. R. 781 at p. 782. See, however, *Re Nixon*, 13 P.R. 314, where Boyd, C., modified this view.

(*w*) 21 Ont. R. 585, at p. 587.

(*x*) The question was whether executors could claim to hold security upon the land of devisees who were indebted to the testator and payment of whose debt was dealt with in the will.

Again, in *Scott* v. *Supple*(*y*), Street, J., adopted the expression of opinion in *Re Reddan*, by reference thereto, although there again the case did not call for a decision on the point, and the case was not one of intestacy, but a case of a charge by will on the whole estate of incumbrances existing on the lands.

2. *The Present Rule—Intestacy.*

The point at last was raised in *Re Hopkins*(*z*), where an application was made to the court by an executor for an order determining "whether the debts of the deceased should be paid out of the personal estate only, or out of the real estate only, or out of both, and, if so, in what proportions." There was in a will a direction that all debts, general and testamentary expenses should be paid by the executor. All the personalty was bequeathed to one legatee; and specific directions were given as to management of the realty, with a direction to sell it at the end of ten years and pay the proceeds to certain persons named. The will continued, "All the residue of my estate not hereinbefore disposed of I give to M. E. U." Although the case was not one of intestacy, and perhaps raised special questions depending on the direction to pay debts and on the residuary disposition, Street, J., said(*a*), "The Devolution of Estates Act vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts, but except in the case of a residuary devise of real and personal estate, which is specially provided for by the 7th section, the order in which the different classes of property were applicable to the payment of the debts before the passing of the Act does not seem to have been disturbed by its provisions. The personal pro-

(*y*) 23 Ont. R. 393, at p. 395.
(*z*) 32 Ont. R. 315.
(*a*) At p. 317.

perty of the deceased, in the absence of some express clause in the will to exonerate it, remains therefore the primary fund for the payment of debts. Here there is nothing pointing to any such intention to exonerate, and it must be applied as far as it will go in payment of them. In case of a balance of debts remaining unpaid, after all the personal estate has been exhausted, recourse must be had to the real estate which is all of one class, that is to say, real estate specifically devised, and each parcel is chargeable in proportion to its value with its proper share of the balance of the unpaid debts, for there is nothing pointing to any intention that one parcel rather than another should first bear the burden." This seems to be the best interpretation of the Act; for while it provides that an additional fund shall be put in the hands of the administrator for payment of debts, there is nothing in the Act which even suggests the alteration of the method of administration previously established by law, except in cases falling under the 7th section.

3. *Testacy—No Residuary Disposition.*

Testacy, where there is no residuary disposition. There being no exceptional cases provided for, but those within the 7th section (viz., the application of a residue), it follows that, where there is a will the rule of administration existing before the Act will continue to be the rule. Consequently if there is no direction as to payment of debts contained in the will, the personalty will be applied, first, in satisfaction of debts as far as it will go(*b*) and if it is exhausted before debts are satisfied it will be the duty of the personal representative to resort to the realty. But if the personalty is sufficient to pay the debts the realty is never charged with them.

(*b*) *Re Hopkins*, 32 Ont. R. 315; *Re Tatham*, 2 O.L.R. at p. 348.

There is nothing in the Act to deprive a testator of the right of charging or exonerating any part of his estate to the benefit or burden of the remainder; and therefore where a testator gives any direction as to payment of debts in any special manner it must be observed as between the parties entitled, though as regards creditors of course the whole estate, real and personal, is directly and fully available.

4. *Land Appointed Under Powers.*

Amongst the assets of the estate are to be reckoned real and personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment(*c*). It will be observed that to meet the requirements of this section the power must be *general, testamentary,* and must have been *actually exercised.* The enactment, in so far as administration is concerned does not for the first time render such property liable to debts, nor does it exhaust all the subject matter of powers which may be resorted to for payment of debts. The effect is to *vest in the executor* such property as is covered by the enactment, and render it liable in his hands for payment of debts.

The liability of property appointed by the donee of a power to payment of the debts of the donee apart from any statutory enactment is thus expressed by Lord St. Leonards(*d*). "Equity holds that where a man has a *general* power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees."

(*c*) R.S.O. c. 127, s. 3.
(*d*) Sugden on Powers, 8th ed. 474.

A power is not property(*e*), nor is it in itself assets(*f*). "If, however, the donee see fit to execute his power, thus assuming a dominion over the property, it may be thenceforth regarded as a part of his estate, and as such subject, at least in equity, to the claims of his creditors. The principle seems to be that *in a sense* the transaction may be considered in the light of—first, an appointment to the donee himself, and then as a gift from him, though in strictness this could not take place where the appointment is by will"(*g*). Where the appointment is made by instrument *inter vivos* resort must be had for relief to the statute against conveyances to defeat creditors(*h*). Inasmuch, however, as it is only property comprised in a "disposition made by *will*" which is within *The Devolution of Estates Act*, it seems clear that the executor will take nothing by the Act, in such a case, though the property may nevertheless be liable to the demands of creditors of the donee of the power.

Where the appointment is made by will, it has been the law of the Court of Chancery for many years that the subject matter of such a power, so exercised, shall be administered for the benefit of creditors before the appointee will be allowed to enjoy any benefit from it. In *Townshend* v. *Windham*(*i*), Lord Hardwicke said, "Where there is a general power of appointment of a sum of money to charge the estate of a third person, which it is absolutely in his pleasure to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself, or his executors if he pleases. If he exercises it voluntarily, without consideration, for benefit of a third person, this

(*e*) 1 Chance on Powers, 2.

(*f*) 2 Chance on Powers, 144.

(*g*) 2 Chance on Powers, 143. See also p. 148.

(*h*) 2 Chance on Powers, 149, citing *Townshend* v. *Windham*, 2 Ves. Sr. at p. 10.

(*i*) 2 Ves. Sr. 1, at p. 9.

shall be considered as part of his assets, and his creditors have the benefit of it." And again(*j*), "The rule of this court are established, as far as they can, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors." The appointee in such cases has even been called a trustee for the creditors of the testator at the time of his death(*k*).

It was said in one case that creditors get their right through the appointment to have the fund administered, and so they cannot take it against the act of the appointor. And so where trustees of a fund subject to a power of appointment advanced to the donee of the power certain sums out of the corpus, and the donee, in exercise of her power, appointed that the trustees should hold the fund upon trust to pay and indemnify themselves for the advances, it was held that creditors of the donee could not compel the trustees to pay over again to them the amounts already advanced to the donee (*l*).

But in a more recent case, where the donee of a power borrowed a sum of money, and, in addition to covenanting to repay the same, covenanted to exercise the power in favour of the lender to the extent of the loan and interest thereon, and did exercise the power in that way, it was held that the creditor took under the testamentary appointment as a legatee; that the exercise of the power made the fund appointed assets for the payment of creditors generally, and the appointee was not entitled to any priority for his debt(*m*).

In order to make the property assets, however, there must be an actual appointment. The courts have never gone so far as to say that, where a man has a power, if he

(*j*) At p. 10.

(*k*) *Jenney* v. *Andrews*, 6 Madd. 264. See also *Williams* v. *Lomas*, 16 Beav. 1.

(*l*) *Re Newnham*, W.N. (1881), p. 69.

(*m*) *Re Lawley*, L.R. (1902) 2 Ch. 673.

neglects to exercise it, they would do it for him(*n*). There is a clear distinction between a power and absolute property in such a case(*o*). The persons entitled to the property in default of appointment have a good title if the appointment is not made, and at least an equal equity with creditors of the donee of the power. And so a testator must have shown a clear intention to make the property his own. And the appointment of an executor merely does not afford sufficient evidence of such an intention. It makes no difference whether the power is one which the donee has reserved to himself, or one which has been given to him(*p*).

Property over which a testator has a general power, though liable for his debts, is not the property of the testator, but was applied by Courts of Equity in aid of the assets which were really his property, and so the personal estate and the real estate, including property specifically devised or bequeathed were applied before the appointed estate(*q*). The present enactment does not change the order of administration, and therefore the same rule would probably be applied as before, except in cases under section 7.

In 1902 an enactment was passed in the following words:—"Property, real and personal, over which a deceased person has a general power of appointment which he may exercise for his own benefit without the assent of any other person, shall be assets for the payment of his debts, where the same is appointed by his will; and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold, after the deceased person's own property has been exhausted"(*r*).

(*n*) *Lassells* v. *Cornwallis*, 2 Vern. 465.
(*o*) *Holmes* v. *Coghill*, 7 Ves. 499.
(*p*) *Re Thurston*, 32 Ch. D. 508.
(*q*) *Fleming* v. *Buchanan*, 3 D.M. & G. 976.
(*r*) 2 Edw. VII. c. 1, s. 6.

The necessity for this Act does not appear, inasmuch as appointed property has been assets for many years, and is expressly within the purview of *The Devolution of Estates Act*. Its purpose seems to be to declare the existing law on the subject, but if so it is not wide enough in its terms. It consists of two parts—one, a declaration that property appointed by will is assets, the other, that it may be seized under execution on certain conditions.

It is quite clear that property, subject to a general power of appointment by deed or will, when appointed by deed to a volunteer is assets for the payment of the donee's debts(*s*). But the present enactment confines its own operation to property the subject of a general power which has been appointed by will. This being a declaration of part of the law only, presumably the law as to other appointments is not affected; and property, the subject of a general power, which may be exercised by deed or will, when appointed by deed to a volunteer will still be assets though not within the purview either of this enactment or *The Devolution of Estates Act*.

The second part of the enactment makes such property appointed by will liable to be seized in execution. That, again, appears to be merely declaratory of what was the law before. For if such property was assets before, and if, under *The Devolution of Estates Act*, it passed to executors, it naturally followed that it might be seized under execution against them. Regarded as a general enactment in that respect the statute was unnecessary; but it is possible that the real purpose of the enactment is to be found in the final clause. The condition upon which the property appointed may be seized in execution is that the testator's own property shall first be exhausted. And it may be that the whole intention of the Act was (as to all such property

(*s*) Farwell on Powers, 2nd ed. 254.

as was already assets), to postpone the remedies of creditors until the testator's own property was exhausted.

Whether that is so or not, it seems that under this clause, the rights of creditors are restricted. Though, as we have seen, the order of administration as between the several species of property was to postpone appointed property until after the property of the testator was exhausted(*t*), there was nothing to prevent a creditor from resorting to any assets of the testator which were available, leaving the rights of legatees and devisees to be settled by marshalling. But this enactment declares that appointed property, though assets, may be seized and sold after the deceased person's own property has been exhausted, thus apparently postponing the right of a creditor to resort to it.

Where property is appointed to executors, it will be a question whether under this enactment it can be administered with the testator's own property, or only after it has been exhausted. Such an appointment has always been held to make the property appointed the property of the estate for all purposes(*u*).

But the effect of this enactment, which makes no distinction between an appointment in favour of a third person (which makes him a specific legatee or devisee) and an appointment to executors (which would make the fund part of the estate), may be that in all cases without distinction the administration of appointed property is to be postponed until after the testator's own property is exhausted. Even where appointed property falls into the estate by reason of the failure of the appointment, the result would be the same.

(*t*) *Fleming* v. *Buchanan*, 3 D.M. & G. 976.
(*u*) Farwell on Powers, 2nd ed. 243, *et seq.*

5. *Testacy—Residuary Disposition.*

Testacy, where there is a residuary disposition;

(a) Including both the realty and personalty. The enactment affecting these conditions is the 7th section of *The Devolution of Estates Act.* "The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts."

The conditions necessary for the application of this section are that the residue must be comprised of both realty and personalty, notwithstanding the use of the disjunctive particle in the phrase "residuary devise *or* bequest." It will be observed that there is no intention to affect the order of administration as between the residue and other species of property, but only to provide for the application of the residue when it comes to be administered. There being realty and personalty both comprised in a residuary disposition, they are to be applied ratably to the payment of debts, but otherwise the rule of administration is not changed. And if after applying the whole residue the debts are not paid, it is presumed that the usual order of administration will proceed or be resumed as the case may be.

Taking sections 3 and 7 alone, appointed property falling within the conditions of section 7 would be dealt with in the same manner as the testator's own property. But the late enactment which postpones appointed property until after the testator's own property has been exhausted will probably take such assets out of the effect of section 7 altogether.

(b) Testacy, where there is a residuary disposition including either realty or personalty exclusively. This case is not affected by the Act at all, and therefore the order of

administration remains as before. But if the property comprised in the residue is property appointed by the will it will be subject to the enactment postponing its administration until after the testator's own property has been administered.

6. *Unexecuted Powers.*

It remains to notice the provisions of *The Execution Act*(*v*) as to powers. "Any estate, right, title or interest in lands which under section 8 of *The Act respecting the Transfer of Real Property*(*w*) may be conveyed or assigned by any person, or *over which he has any disposing power* which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the person might himself have done."

Under this enactment an execution against the donee of a power will bind the subject matter thereof, although the power may not be exercised. And if the donee should die without exercising the power, there seems to be no reason why the execution should not continue to bind the property, in favour, at least, of the execution creditor as against the person entitled in default of appointment(*x*).

Though the section is not well expressed it is probably the intention of the enactment that the land is to be subject to execution to the same extent and for the same estate or interest as the donee had power to appoint it for.

(*v*) R.S.O. c. 77, s. 33 (1).
(*w*) A contingent, an executory, and a future interest, etc.
(*x*) See and cf. *Meyers* v. *Meyers*, 19 Gr. 185.

7. *Incumbered Land.*

Where the land of the deceased person is subject to incumbrances it remains primarily liable to bear its own burdens pursuant to *The Wills Act*(*y*), notwithstanding sections 4 and 7 of *The Devolution of Estates Act.* The debts referred to in these sections are not those debts which are charged upon and secured by land(*z*). It is still necessary that there should be a specific direction in the will to exonerate the incumbered land. When there is such a direction, the mortgage debts are to be paid, as other debts, in the ordinary course of administration, or pursuant to the directions in the will(*a*).

Executors being, under *The Devolution of Estates Act,* representatives of the estate for all purposes, may claim to hold the land devised as subject to and security for a debt due by the devisee to the estate(*b*).

8. *Retainer.*

Where an executor has a right of retainer for a debt due to himself by the testator, and allows the land to shift into the beneficiary, he loses his right of retainer(*c*).

(*y*) R.S.O. c. 128, s. 37.
(*z*) *Mason* v. *Mason,* 13 Ont. R. 725.
(*a*) *Scott* v. *Supple,* 23 Ont. R. 393.
(*b*) *Tillie* v. *Springer,* 21 Ont. R. 585.
(*c*) *Re Starr,* 2 O.L.R. 762.

CHAPTER XIII.

Land as Assets.

1. *Common Law.*
2. *Statute of Fraudulent Devises.*
3. *Statute of 5 Geo. II.*
4. *Execution Act.*
5. *Devolution of Estates Act.*

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1. *Common Law.*

At common law, simple contract creditors had no remedy against the heir for payment of debts(*d*). But the heir was personally liable, as a debtor, at common law, to the extent of the land descended to him, to satisfy those debts with the payment of which his ancestor had charged him by specialty contract, and the remedy of the creditor was by action of debt or covenant(*e*).

2. *Statute of Fraudulent Devises.*

When power to devise land was given, testators could dispose of their land to devisees and thus defeat specialty creditors, and consequently the statute against fraudulent devises was passed(*f*), whereby it was enacted that devises should be void as against such creditors; that such creditors in such cases should have their actions of debt(*g*) against such devisees jointly with the heir.

(*d*) Williams on Real Assets, 2, 15.

(*e*) Williams on Real Prop. 19th ed. 81; Williams on Real Assets, 16.

(*f*) 3 W. & M. c. 14.

(*g*) The Act did not give them an action of covenant; see *Wilson* v. *Knubley*, 7 East 128.

It further enacted that in case any heir should be liable to pay the debt of his ancestors, in regard to any lands descending to him, and should sell them before action, such heir should be answerable in an action of debt to the value of the land so sold, but the lands so alienated *bona fide* before action should not be liable. Devisees were made liable in the same manner as heirs upon alienation of land.

The effect of this Act was not to make the debts a charge on the lands, though, while the lands were in the hands of the heir or devisee, they might be seized in execution in an action of debt against them. And if no proceedings were taken the heir or devisee might sell and make a good title thereto(*h*). But both heirs and devisee, in their respective cases, remained personally liable for debts to the extent of the value of the land upon such a sale being made(*i*). Under this Act an action might have been brought against the heir or devisee by any unpaid creditor. This statute was in force in Ontario until repealed(*j*) and a partial substitute provided(*k*) which will presently be referred to.

3. *Statute of 5 Geo. II.*

But an additional remedy for creditors was provided by a statute passed for the special purpose of making lands in the colonies liable for payment of debts(*l*). By this Act it was enacted that "the houses, lands . . . and other hereditaments and real estates, situate or being within any of the said plantations [*i.e.*, the British plantations in America] belonging to any person indebted shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person

(*h*) *Richardson* v. *Horton*, 7 Beav. 112.
(*i*) *Spackman* v. *Timbrell*, 8 Sim. 253, at p. 259.
(*j*) 2 Edw. VII. c. 1, s. 2, and sched.
(*k*) Ibid. s. 4.
(*l*) 5 Geo. II. c. 7, s. 4.

to His Majesty or any of His subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, . . . and other hereditaments and real estates, towards the satisfaction of any such debts, duties and demands, and *in like manner as personal estates* in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts." It was held at a very early date that this statute made the lands of a deceased debtor assets for the satisfaction of all his debts, and that they might be reached by the same proceeding as personal estate might be reached, namely, by action against the administrator or executor, and that too although such lands in fact passed to the devisee or heir(*m*).

It was only after a great deal of fluctuation of opinion that this result was arrived at, and many decisions were the other way, as shown in the judgment in the case last cited. The law, however, having become for the time being established by the decision in this case, actions against the heir became infrequent, if not obsolete(*n*), as, in almost every case, judgment and execution against the executor or administrator would reach whatever could have been reached by a judgment against the testator or intestate(*o*).

(*m*) *Gardiner* v. *Gardiner*, 2 O.S. 554.
(*n*) Per Draper, C.J., in *Rymal* v. *Ashberry*, 12 C.P. at p. 342.
(*o*) Ibid. at p. 343.

4. *Execution Act.*

Some doubt having been cast upon the case of *Gardiner* v. *Gardiner* by a decision of the Judicial Committee of the Privy Council(*p*), an Act was passed in 1863(*q*), whereby it was recited that the courts had held that under the Act 5 Geo. II. c. 7, the title of an intestate or testator in real estate might be seized and sold under judgment and execution by a creditor of the deceased against his executor or administrator, and that many titles had been acquired under such proceedings, and that it was desirable to quiet them; and whereby it was enacted as follows:—"Under the said Imperial statute, the title and interest of a testator or intestate in real estate in Upper Canada, might be, and hereafter may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate against his executor or administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living"(*r*). This enactment has been continued to the present day and now with the necessary verbal modifications forms part of *The Execution Act*(*s*).

In consequence of this enactment a creditor might always by an action against the personal representative obtain judgment and execution against the land of a deceased person for satisfaction of his debt. It was not necessary that the heirs should be parties to an action against the personal representative. The judgment against him bound them and entitled the creditor to execution against the land just as it bound the next of kin and entitled the creditor to execution against the goods of the deceased; though it was

(*p*) See per Strong, V.C., *Willis* v. *Willis*, 19 Gr. at p. 575; and *Freed* v. *Orr*, 6 App. R. at p. 702.

(*q*) 27 V. c. 15.

(*r*) S. 1.

(*s*) R.S.O. c. 77, s. 35.

open to either class to show that the judgment was obtained by fraud or collusion, or for a debt which should not be so liquidated(*t*).

The passing of *The Devolution of Estates Act*, in so far as it vests the land in the personal representative, did not affect creditors' rights in this respect. Land could have been reached before that Act through the personal representative, but he had to submit to being sued, for he had no control over the realty. *The Devolution of Estates Act* puts the land into his hands for a time and enables him to make use of it for payment of debts if necessary, and thus enables him to avoid a suit. But if it passes to the beneficiaries without being used for payment of debts, the creditor may still sue the personal representative and get execution against lands, and thus reach the land as before.

At the time when *Gardiner* v. *Gardiner* was decided there were many colonies in which land was already assets in the hands of the personal representative, and many (including Upper Canada) in which it descended to the heir. But, on an exhaustive review of all these, Robinson, C.J., held that it made no difference whether the property in the land was vested in the personal representative or not, for the Act of Geo. II., giving as it did a statutory power to follow the land, gave a remedy equally efficacious in each case(*u*).

Bearing this in mind, the vesting of the realty in the personal representative under *The Devolution of Estates Act* does not make the remedy by judgment and execution against him any more efficacious than before; nor, on the other hand, does the shifting of the land into the heir or

(*t*) *Lovell* v. *Gibson.*, 19 Gr. 280; see *Willis* v. *Willis*, 19 Gr. 573, where *Lovell* v. *Gibson* was doubted, but followed; see also *Freed* v. *Orr*, 6 App. R. 600; *Ianson* v. *Clyde*, 31 Ont. R. 579.

(*u*) See pp. 538, *et seq.*; and the suggestion at p. 555, that personal representatives should be given the power of voluntary disposition of lands.

devisee under the same statute render it any less efficacious. Notwithstanding, then, that the land may pass to the heir or devisee under *The Devolution of Estates Act*, the creditor may still proceed by action against the personal representative and reach the land in the hands of the heir or devisee by execution.

As there is no charge or lien upon the land itself by reason merely of there being debts, but only a right in the creditor to obtain a charge by execution, it follows that either the heir or devisee may dispose of the land by sale for valuable consideration to a purchaser in good faith, or mortgagee, at any time before execution, and the purchaser or mortgagee will get a good title (*v*) and the purchaser will not be bound to see to the application of the purchase money, even if he has notice of the existence of debts, being entitled to assume that the money will be properly applied (*w*).

But if a purchaser under an execution against the heir or devisee has notice of debts of the deceased, he will take only the beneficial interest of the heir or devisee, or, in other words, will take the land subject to the payment of the debts of the deceased (*x*).

The creditor, then, had two ways of reaching the land—one by suing the personal representative, whereby, on showing the descent or devise of lands, and that they are still in the hands of the heir or devisee, he became entitled to execution against them; the other, by suing the heir or devisee after the land had become vested in him under the Statute of 3 W. & M. c. 14, or its substitute.

But if the heir or devisee had disposed of the land, then the action would have been an action of debt against

(*v*) *Reed* v. *Miller*, 24 U.C.R. 610; *Gordon* v. *Gordon*, 11 Ont. R. 611; 12 Ont. R. 593.

(*w*) *Kinderley* v. *Jervis*, 22 Beav. 22.

(*x*) *Peck* v. *Bucke*, 2 Ch. Ch. 294.

him(*y*), and no action would have lain against the personal representative unless he had been guilty of some wrong.

5. *Devolution of Estates Act.*

These being the conditions before *The Devolution of Estates Act*, it becomes necessary to examine section 20 of that Act, and sections 4 and 5 of the recent Act(*z*), in order to ascertain whether they affect the position of a creditor. Section 20 of *The Devolution of Estates Act* is as follows: —"Persons *bona fide* purchasing real estate from a devisee whose devise has been *assented to* by the executors or administrators by deed, or by writing under their hand, or *bona fide* purchasing the real estate from any heir at law or devisee to whom the same has been *conveyed* by the executors or administrators, shall be entitled to hold the same freed and discharged from any unsatisfied debts and liabilities of the deceased owner not specifically charged thereon otherwise than by his will; but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir at law or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators or permitted to become vested, to the prejudice of such creditors."

The operation of this section is confined strictly by its wording to cases of conveyance by the personal representative to the heir or devisee during the year (now three years(*a*)) after the death of the deceased, or during the currency of a caution. For the case of shifting is not only not mentioned in this part of the section but was formerly provided for by section 13 of the Act, and now by sections

(*y*) Creditors' remedies since the appeal of the Statute 3 W. & M. c. 14, will be discussed in the next section.

(*z*) 2 Edw. VII. c. 1.

(*a*) See 2 Edw. VII. c. 17, s. 3.

4 and 5 of the recent Act, 2 Edw. VII. c. 1. The interests of assigns are protected against cautions by section 15 of the principal Act, and the liability of heirs and devisees defined by the recent statute.

On this reading the statute will now be dealt with.

It is divided into two parts. The first part is designed to provide protection to persons purchasing from heirs or devisees who hold by conveyance or "assent" from the personal representative. The second part saves the rights of creditors as against executors, administrators, heirs and devisees, where the purchaser has got a good title from the heir or devisee.

As to the first part. The persons to be protected are purchasers in good faith from the heir or devisee; or, changing the expression, the land, by inference from the wording of the clause, is no longer subject to debts when it has been purchased in good faith from the heir or devisee; and in order to qualify as a purchaser in good faith there must be no notice or knowledge of debts due by the deceased. The conditions under which purchase may be made in order to bring this section into operation, are;

When the devise had been assented to "by the executors or *administrators.*"

When the heir or devisee has received his land by conveyance from the executors or administrators.

Considering that no "assent" to a devise is necessary under the Act(*b*), and that the land will pass to the devisee by virtue of the Act if no caution is registered, it is difficult to see why this provision was introduced. It professes to make a good title to a purchaser from a devisee under circumstances (*i.e.*, when his devise has been assented to) not otherwise or elsewhere contemplated or provided for by the Act. If it be necessary to assign some meaning to the word

(*b*) See per Maclennan, J.A., *McKinnon* v. *Lundy*, 21 App. R. at p. 567.

"assent," it cannot bear the technical significance in which it is used when applied to a legacy. It will be necessary to assign to it a meaning entirely popular, and to hold within its purview any instrument evidencing that the executor will not require the land for the purpose of paying debts, not being a conveyance, which is subsequently provided for; or evidencing that the devisee may deal with the land without regard to the requirements of the executor.

Assent to a devise by an *administrator* must mean assent by an administrator with the will annexed, otherwise it has no meaning at all.

The assent in either case might occur when a personal representative concurs in a conveyance by the devisee during the year (now three years) after the death, or during the currency of a caution.

The second class of cases are those in which the executor or administrator has conveyed to the devisee or heir. Nothing need be said as to this save that there must be an actual conveyance of the land—something different from the assent which is spoken of in the prior part of the section.

When these conditions are present, the section becomes operative, and the heir or devisee may convey to a purchaser in good faith.

While the land is in the hands of the heir or devisee under these conditions, it appears to be the result of recent legislation to render him free from action at the suit of creditors. As long as the Fraudulent Devises Act was in force, the heir or devisee might have been sued by a creditor, as has already been pointed out. But that statute has been repealed(c), and no general equivalent has been enacted. Section 4 of the Act just cited renders land liable for debts in the hands of the heir or devisee when it has shifted into them under the 13th section of *The Devolution*

(c) 2 Edw. VII. c. 1, s. 2, and sched.

of Estates Act, but there is now no enactment which makes them liable if they receive the land by conveyance from the executor or administrator. It is true that the concluding part of section 20 (now under consideration) declares that nothing in the section contained "shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir at law or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators, or permitted to become vested, to the prejudice of such creditors." But this only saves such rights as existed before, and does not confer any new rights upon creditors. The right to sue the heir or devisee depended entirely upon the Statute of 3 W. & M. c. 14, and that being repealed, there is now no right to sue the heir or devisee under the conditions of section 20. The consequence is that when an executor or administrator has conveyed to a devisee or heir, the latter is immune from actions, but the creditors may still sue the personal representative and obtain judgment and execution which will reach the land in the hands of the heir or devisee by virtue of *The Execution Act*(*d*).

There seems to have been an idea in the mind of the draftsman that an executor or administrator was, or would be, *personally* liable to a creditor for conveying the land to the beneficiaries; for the section saves the rights of the creditor as "against the executors or administrators *personally*" if they have conveyed to, or permitted the land to become vested in the beneficiaries "to the prejudice of such creditors." No such right exists if the personal representative has not acted improperly. If he has advertised for creditors and has no knowledge of any claims when he conveys the land to the beneficiaries he will not be liable(*e*). The saving of this clause must therefore mean the saving

(*d*) R.S.O. c. 77, s. 35.

(*e*) *Re Cary & Lott*, L.R. (1901) 2 Ch. 463.

of the right to sue the personal representative merely for the purpose of getting execution against the land in the hands of the beneficiaries under *The Execution Act*, or in case he has been guilty of some wrongful conduct. If the heir or devisee should convey to a purchaser in good faith, he is declared by section 20 to hold the land free from "unsatisfied debts and liabilities of the deceased owner *not specifically charged thereon otherwise than by his will.*" This is an unfortunate and obscure phrase. Debts not forming a lien on land in the lifetime of the debtor are never a charge by law upon land after his death. And there is nothing in this Act to make them a charge.

In order to arrive at its true meaning it seems necessary to take the whole phrase "specifically charged thereon otherwise than by his will" as one adjective, and for the purpose of simplifying it, to adopt the phrase "mortgage-charged." The clause will then read—"freed and discharged from any unsatisfied debts and liabilities of the deceased owner not mortgage-charged." That is to say, freed from all debts which do not form a lien on the land itself—as mortgages, executions, liens, etc., which the land, under Locke King's Act, must bear itself. Perhaps the phrase might be paraphrased thus—"freed and discharged from all debts except such as have been specifically charged on the land by some instrument other than the will of the testator." Again, they must be debts and liabilities of the *deceased owner*, and therefore not liabilities created by the will, such as legacies charged upon land, which are not either debts or liabilities of the deceased owner. This will clearly appear when the land is that of an intestate. Only such debts and liabilities as formed a lien on the land in the intestate's lifetime, or became a lien by execution after his death, would be within the words of the enactment.

What then would be the position of a purchaser of land

which is charged with the payment of debts by the will itself?

It has been uniformly held that where debts are charged upon land by will, a purchaser from the executor, trustee or devisee is not bound to see to the application of the purchase money.

Attention must now be directed to the provisions of sections 4 and 5 of the recent *Statute Law Revision Act*(*f*).

Section 4 enacts that "The lands of a deceased person which shall become vested in his heir or devisee under the 13th section of *The Devolution of Estates Act* shall continue to be liable to answer the debts of such deceased person as they would be if vested in the personal representative of the deceased, and in the event of a *bona fide* sale thereof for value by such heir or devisee he shall be personally liable for the debts due to the creditors of such deceased person to the extent of the proceeds of such lands, and in case the sale shall not have been *bona fide*, then to the extent of the actual value of the said lands."

Whereas section 20 of the principal Act is by its terms confined to cases of conveyance by the personal representative to the heir or devisee, or assent to his ownership of or dealing with the land, the present section is, by its terms, confined to cases of shifting under the principal Act. Where this occurs the heir or devisee is liable to be sued by a creditor of the deceased, in order that the land may be reached, or the creditor may at his election sue the personal representative and get judgment and execution which will bind the land under *The Execution Act*. The action against the heir or devisee seems to be the preferable proceeding; for this enactment (unlike the Statute 3 W. & M. c. 14 which gave only a personal action of debt against the devisee) seems to aim at making the land itself liable in the hands of the heir or devisee. In other words the enactment

(*f*) 2 Edw. VII. c. 1.

seems to make a general charge of debts upon the land in the hands of the heir or devisee(*g*); and thus enables the creditor to sue for realization of his charge, instead of being left to an action of debt against the heir or devisee. The advantage of this is that while an action is pending to realize the charge, the heir or devisee cannot dispose of the lands. The disadvantage is that, whereas under the statute 3 W. & M. c. 14 an action might have been maintained and execution issued generally against the property of the defendant, judgment and execution can go under this enactment for the debt to be made out of the land only. But if the heir or devisee disposes of the land (before action presumably) then a personal action of debt will lie and judgment may be recovered for the debt to the extent of the value of the land, or the amount of the purchase money, according as the sale may not or may have been *bona fide*. Where a sale is made by the heir or devisee without any knowledge of debts, he is acting in good faith, and is making a *bona fide* sale under such circumstances. Where he has knowledge of debts he may also act *bona fide* in making a sale if he has reason to believe that the debts will be paid without resort to the land, though that may ultimately prove to be an erroneous opinion.

Where the purchaser buys from the heir or devisee under such circumstances, and "without notice of the claims of any unpaid creditors of the deceased person, through whom such heir or devisee shall claim," he "shall be entitled to hold such lands freed and discharged from the claims of such creditors"(*h*).

There is a difficulty in applying this section, unless section 4 in interpreted as making the debts a specific charge on the realty. An Imperial Act of like import has not been

(*g*) See *Kinderley* v. *Jervis*, 22 Beav. 1.
(*h*) 2 Edw. VII. c. 1, s. 5.

so interpreted(*i*). By this Act it is declared that lands "shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty." In *Kinderley* v. *Jervis*(*j*), Sir John Romilly, M.R., said, "It was not the object, nor is it the operation, of the Statute 3 & 4 Wm. IV. c. 104, to make the simple contract debts of a deceased person in the nature of mortgage or specific charges on his real estate, but as the statute makes the land *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bona fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase money, as he would be in the case of a particular mortgage on any portion of the lands themselves. The purchaser assumes, as in the case of the sale of personal assets, that the sale is required for the due administration of the estate and affairs of the deceased debtor, and is not bound to inquire further. The case would be varied in either case, if the purchaser had received direct knowledge that the sales were made for the purpose of defeating creditors, and had thereby become a participator in the fraud." Regarding the present enactment, and *The Devolution of Estates Act*, in this light—as simply making the land assets, first, in the hands of the personal representative, and secondly, in the hands of the heir or devisee, a purchaser with notice of debts might still be a *bona fide* purchaser, being entitled to assume that the money would be properly applied. There is no statute or other law to charge the land specifically with the debts, nor to make a purchaser liable for debts merely by reason of his acquisition of the lands. While section 5 declares that he shall get a good title if he has no knowledge of debts, there is nothing affirmative to render the lands liable in his hands for

(*i*) 3 & 4 Wm. IV. c. 104.
(*j*) 22 Beav.1, at p. 22.

payments of debts even if he has knowledge of them, provided that he buys in good faith and is not a party to a scheme to defraud creditors. In the absence of some positive enactment making the land specifically liable, or charging the purchaser to see to the application of the purchase money, it would seem that he would get a good title even if he had knowledge of debts provided that he acted in good faith. The only alternatives—to give effect to the provision as to want of notice—are either to treat section 4 as making a specific charge of debts upon the land (which is not warranted either by the language, or the English decisions upon a similar Act), or to treat sections 4 and 5 as giving the heir or devisee such a qualified title as disables him from conveying except to a purchaser without notice. The objection to this last interpretation is that it subordinates the whole of the positive or affirmative enactment to a clause or phrase which itself is grammatically subordinate to the whole enactment.

It is more than questionable whether section 4 renders land liable for any claim except a "debt" of the deceased. The same word was used in the Act 3 W. & M. c. 14, and it was held not to include actions for breach of covenant(*k*). In section 5 the word "claims" is used, but in connection with the word "creditors," which appears to make it equivalent only to "debts."

It is also to be observed, though the result is not quite apparent, that the debts which are spoken of in these two sections are not as elaborately defined as the debts spoken of in sections 19 and 20 of *The Devolution of Estates Act*, viz., debts not specifically charged thereon otherwise than by his will.

(*k*) Ante, p. 184.

CHAPTER XIV.

CURTESY.

1. *Contrast Between Dower and Curtesy.*
2. *Share in the Estate Primary Right.*
3. *Right to Elect Only Upon Complete Intestacy.*
4. *As to What Election May be Made.*
5. *Where There is no Election.*
6. *Time for Election.*
7. *Abandonment of Share by Contract.*
8. *Distribution of Land Not Separate Estate.*
9. *Devolution Where Husband Elects.*
10. *Distribution Amongst Heirs After Election.*

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1. *Contrast Between Dower and Curtesy.*

While dower is expressly preserved to the widow by the Act, and she is permitted to elect to take a share in the undisposed of realty of her husband in lieu thereof, the husband of a deceased married woman is given a share in her whole estate, real and personal, as his primary right, unless he can and does elect to take such interest as he would have had before the Act under the conditions mentioned in the Act. Again, while a widow elects between her dower and a share in the undisposed of realty of her husband, a husband must elect, not between his estate by the curtesy and a share in the realty, but between the interest which he would have had, but for the Act, in the real and personal estate of his wife, and the share in the real and personal estate given by the Act. The Act does not permit him to elect between curtesy and a share in the land, but makes the existence of his title to curtesy a condition of the right or privilege of electing against the Act.

2. *Share in the Estate, Primary Right.*

In order to obtain a correct idea as to the effect of the section relating to tenancy by the curtesy, section 5 of the Act should be read first. Thus:—"The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows:—One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had pre-deceased her."

The intention of this clause is clearly to require the husband to take, as his primary right in his wife's estate, a distributive share, instead of leaving it to his choice to accept it in lieu of his common law right of curtesy, in case of an intestacy. He may, however, elect against this share and the interest which he would have had but for section 5. Thus, by section 4, sub-section 3, "Any husband who, if sections 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed or instrument in writing executed within six months after his wife's death, and attested by at least one witness, elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of this Act."

3. *Right to Elect Only Upon Complete Intestacy.*

Although it is not expressly provided that the husband is to elect only in cases of complete intestacy, it will be found that that is the combined effect of these two sections. Section 5 requires the husband to take a distributive share in his wife's realty upon her intestacy; and so where he

would have been entitled to curtesy before the Act he will now be obliged to take a distributive share under the Act, upon her intestacy. If we turn now to section 4, sub-section 3, we find that the first condition for election is that the husband should have been entitled to curtesy if section 5 had not been passed, *i.e.*, should have been entitled to curtesy upon an intestacy. In other words, section 5 deprives the husband of his estate by the curtesy only on an intestacy, while section 4, sub-section 3, entitles him to elect, where he would have been entitled to curtesy but for section 5, that is, on an intestacy. The first condition is therefore intestacy.

4. *As to What Election May be Made.*

That condition being present, the husband may elect to take his previous interest, but it is not to be taken in the realty alone. If he elects, he must elect to take "such interest in the real *and personal* property of his deceased wife as he would have taken if the said sections had not passed." Thus he must in every case of election take his previous interest in both realty and personalty, and that can only occur when the wife dies intestate as to both realty and personalty.

The two sections may be paraphrased thus:—"When a married woman dies intestate, her husband shall take one-third of her real and personal estate if she leaves issue, and one-half if she leaves none; but in such a case if the husband (but for this enactment) would have been entitled to curtesy, then he may, instead of his share under section 5, elect to take his interest in both realty and personalty which he would have been entitled to but for this enactment." The first and universal condition of election is therefore complete intestacy. The second is that the common law conditions necessary to entitle him to curtesy should be present.

5. *Where There is no Election.*

According to circumstances then we shall find that a husband may still be entitled to his estate by the curtesy and will not be put to election; or he may be entitled to a share under the statute without the right of electing.

Thus, where a wife disposes by will of realty not being separate estate, and dies intestate as to personalty, her husband will be entitled to his estate by the curtesy, and will also get his distributive share of the personalty. For section 5 deprives him of his curtesy only in cases of intestacy, and it is only where section 7 would have made a change that section 4, sub-section 3, becomes operative. In order to put him to his election, it is not sufficient, as we have seen, that he should be entitled to curtesy simply, but the conditions are that he should have been so entitled if the Act had not been passed. The passing of the Act takes away his estate by the curtesy, and substitutes a distributive share, only in cases of intestacy.

On the other hand, if the wife should die intestate as to land, whether separate estate or not, but should dispose of her personalty by will, the land will go and devolve under section 5, in the proportion of one-third to the husband if she leaves issue, and one-half if she leaves none. In this case, also, he will not be put to an election, but will be obliged to take his statutory share in the land. For he cannot elect to take "such interest in the real *and personal* property of his deceased wife as he would have taken if the said sections of the Act had not passed," for there is no intestacy as to the personalty.

In all cases of intestacy as to realty and personalty, however, the husband must take his distributive share under the Act unless he elects to take the interest in both realty and personalty which he would have taken if the Act had not been passed.

6. *Time for Election.*

Unlike the case of a doweress again, the husband is limited to six months after his wife's death within which to elect. But, like the case of a doweress, he is to elect by a deed or instrument in writing attested by at least one witness.

7. *Abandonment of Share by Contract.*

Where a husband upon marriage abandons any interest in his wife's property, he is not entitled to share under the Act. Thus, in *Dorsey* v. *Dorsey*(*l*), the plaintiff, before marriage, delivered to his intended wife a paper signed by him in the following terms:—"Toronto, December 3rd, 1894. Articles of agreement. This is to certify that I, Henry Dorsey, through marriage to Ann Eliza Thomas, will not assert any right or claim on the property of the said Ann Eliza Thomas, either real estate, cash in bank, household or personal effects." In an action against the wife's administratrix for a distributive share under *The Devolution of Estates Act*, it was held that he had contracted himself out of any share in the estate(*m*).

8. *Disribution of Land Not Separate Estate.*

It will be noticed that no provision is made in the Act for disposing of the land of a married woman free from her husband's estate by the curtesy without his consent. Where the land is separate estate, it is possible that this may be done under the provisions of The Married Woman's Property Act, as will presently be seen(*n*). But where the land is not separate estate, there is no necessity for it. If the land is not separate estate there can be no debts of the

(*l*) 29 Ont. R. 475; 30 Ont. R. 183.

(*m*) See also *Moore* v. *Webster*, L.R. 3 Eq. 267, and cases there cited.

(*n*) See next chapter.

married woman for which it ought to be rendered liable. The provision of the 4th section of the Act, that land shall devolve subject to the payment of debts, means, of course, subject to debts legally contracted by the deceased. And as a married woman can only charge her separate estate, there can be no debt or engagement for which land which is not separate estate can be liable. There is therefore no occasion for a sale for any other purpose than that of distribution. As distribution under the statute cannot take place until after the period has elapsed within which the husband may elect against the statute, no sale can take place during that period which will deprive him of his curtesy without his concurrence. But if the time for election passes without election, or if the husband concludes himself from electing against the Act within that period, the personal representative can sell free from his estate by the curtesy for the purposes of distribution, under section 5 of the Act, if the provisions of section 16 are complied with.

If the year (now three years) elapses, the husband not having elected, the land shifts into the beneficiaries by virtue of section 13 of the statute.

9. *Devolution Where Husband Elects.*

If, however, the husband elects to take his estate by the curtesy, different considerations at once arise. Section 4, sub-section 3, enacts in that case that his interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of the Act. This is not well expressed. If the word "further" had been omitted from the latter clause and it read, "he shall be entitled to no interest under the said sections," it would have been more correct, in view of the principal part of the enactment that he is to take such interest as he would have taken if the said sections had not passed. We shall assume that that is the meaning. If

so, then, the operation of this Act, as far, at any rate, as the husband's interest in the land is concerned, is completely excluded or suspended, upon his election to take against it. The interest which he takes is that which he would have taken before the Act. He must therefore take in his marital right in opposition to, or exclusive of, any right which either he or any other person would have under letters of administration. And although letters may have been granted, and although the land may have temporarily vested in the personal representative, by virtue of section 4, subsection 1 of the Act, yet immediately upon the husband's election he becomes entitled as tenant by the curtesy, and the right or authority of the personal representative, as such, is divested and gone during the husband's lifetime; or perhaps it would be more correct to say that the administrator, instead of being seised in fee simple in possession, becomes, upon the husband's election, entitled to the reversion in fee expectant upon the husband's estate. No interest can afterwards be taken under this Act by the husband.

It follows from this that the personal representative, as such, has, as against the husband, no right of caution, either before or after the expiration of the year, or three years, from the married woman's death.

10. *Distribution Amongst Heirs After Election.*

What effect, then, has this upon the interest of those entitled to the land subject to the husband's estate by the curtesy? Though the Act seems to be completely excluded from operation as far as the husband is concerned, it does not follow that it is excluded from operation as to those entitled to the reversion in fee. Upon the death of the married woman, the land vests in the personal representative and "so far as the said property is not disposed of by deed, will, contract or *other effectual disposition*, the same

shall be distributed as personal property not so disposed of is hereafter to be distributed." The mention of disposition by deed, will or contract seems to cover all methods of disposition except a disposition by law, or by election under the Act. And therefore "other effectual disposition" may well refer to and include some disposition not made by deed, will or contract, and not in accordance with the scheme of distribution proposed for the future. If this is a good reading of this clause, it means, when applied to the case in hand, that so far as the land is not effectually disposed of by the election of a surviving husband to take his estate by the curtesy, it is to be distributed as personal property is hereafter to be distributed. The use of the word "hereafter" is necessary in consequence of the provisions contained in sections 5 and 6 of the Act, which to some extent modify the Statute of Distribution.

We may therefore take it that, subject to the estate by the curtesy, the land is to be distributed as personalty; or, the reversion in fee expectant upon the estate of the husband is to be distributed under the Act. It follows then that after an election by the husband, the personal representative will hold the reversion in fee for the next of kin of the deceased.

It cannot however be distributed under section 5. This section provides only for a distribution in which the husband shares:—"One-third to her husband if she leaves issue, and one-half if she leaves no issue." The concluding words:—"And subject thereto shall go and devolve as if her husband had pre-deceased her"—are conditional, and apply to the case of the husband's taking a share(*o*). Where the husband elects to take his estate by the curtesy, he takes nothing that belongs to his deceased wife's estate. He takes his own property, just as a doweress accepting her

(*o*) Cf. *The Statute of Distribution*, as to advancement; Williams on Executors, 9th ed. 1370.

dower takes nothing of her husband's estate, but her own property only. What belongs to the wife's estate, after the husband has elected to take his estate by the curtesy, is the reversionary interest in fee, and this reversionary interest is the property of the wife's next of kin under the Statute of Distribution. The result is that the personal representative upon such an election holds the reversionary interest in fee for distribution amongst those who are the next of kin of the wife at the time of her death, without regard to the husband, who has chosen to take his own property in the land.

CHAPTER XV.

Separate Estate.

1. *Before The Devolution of Estates Act.*
2. *Since The Devolution of Estates Act.*

In dealing with separate estate, two periods have to be observed; the first being from 25th March, 1884, when *The Married Women's Property Act* was passed(*p*), to 30th June, 1886, both days inclusive, during which period that Act was alone in force. On the 1st July, 1886, *The Devolution of Estates Act* came into force, and the second period dates from that day, since which both statutes have been in force.

1. *Before The Devolution of Estates Act.*

As to the first period. By section 19 of *The Married Women's Property Act*(*q*) it is enacted as follows:—"For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have or be if she were living." It will be necessary first to consider the effect of this clause alone, and afterwards its effect when taken in connection with the provisions of *The Devolution of Estates Act*. This clause appears in the Imperial Act from which the Ontario statute was copied. The purport is not abundantly clear. Lennard(*r*) thinks that it could not have been

(*p*) 47 V. c. 19.
(*q*) Now R.S.O. c. 163, s. 23.
(*r*) Position in law of women, p. 107.

intended to make the personal representative of a married woman succeed to her land by such an indirect method of legislating, though he observes that the phrase used in the statute which is descriptive of property is *separate estate* (which would include land) and not *separate personal property* only. Griffith(*s*) thinks that it does apply to real property. "It is conceived," he says, "that the words of this section are wide enough to enable her executor or administrator to be as it were her real representative, so as, for the purposes of this Act, to enable her entire separate property to be dealt with." Lush(*t*) thinks that the clause applies only to personalty.

There is no adjudication upon the meaning or scope of the section. But in the case of *Hope* v. *Hope*(*u*), which was a friendly action between a father and his children, to have it determined whether he was entitled to his estate by the curtesy in land of his deceased wife, it was held that he was so entitled, and no reference was made in any way to this section. It might be deduced from this that there was a *consensus* of opinion that it had no bearing upon the question. It might also be inferred that it was overlooked.

In the absence of any authority upon the subject, no more can be done than point out the probable scope of the enactment. In sections 3, 4, 6, sub-section 2; 7, 8, 15 and 16, "separate property" and "separate estate" include land as well as personalty, in all their provisions. In section 5, real estate and personal property are separately spoken of. In section 6, sub-section 1, "wages, earnings, money and property" are made "separate property." Sections 10 to 14 deal with stock and investments by those names, and in section 20 of the original Act, the mode of

(*s*) Married Women's Property Acts, 6th ed. p. 144.
(*t*) Husband and Wife, 2nd ed. p. 83 note (*f*).
(*u*) L.R. (1892) 2 Ch. 336.

distribution of "separate *personal* property" upon an intestacy is provided for.

It may fairly be deduced from a perusal of these sections that whenever the property of a married woman is spoken of generally, either by making it the separate property of the wife, or by making it liable for her debts, or protecting it from her husband, it includes both real and personal property. No special provision is made for any particular species of property, but wages, earnings, money, etc., are protected and made separate property. When we arrive at section 23 and find that another general provision is made as to "separate estate" in general terms, it is difficult to avoid the conclusion that both realty and personalty were intended to be affected.

And this deduction is confirmed when we return to section 20, and find that separate *personal* property is there spoken of and its distribution provided for. It may fairly be assumed then that it applies to land.

The section in question declares that the personal representative shall have "the same rights and liabilities and be subject to the same jurisdiction " as the married woman would have or be if she were living. Her rights are to hold separate from her husband, and to convey free from him. Her liabilities are to answer with all her separate property, real and personal, any contract made respecting the same. The jurisdiction to be invoked would be the courts, and the manner of invoking would be by action or summary proceeding under section 19 of the Revised Statute. One of the treatises above cited(*v*) treats the personal representative as authorized to apply under this section as to realty.

It would seem to be perfectly clear that if the administrator of a married woman were sued for a debt contracted by her with respect to her separate estate, the realty would be answerable, under the words of this section, as well as

(*v*) Griffith's M.W. Prop. Acts, 6th ed. p. 144.

the personalty, and there seems to be no reason why judgment should not be given against the land. Similarly, the words are wide enough to authorize an action for specific performance against the personal representative of an agreement by the married woman to sell her land. If this be so, then it is impossible to avoid the conclusion that he might avoid an action for specific performance by conveying the land pursuant to the contract, or in the other case might avoid an action at the suit of a creditor by selling the land and paying the debt. If he is able to sell, he must be able to dispose of the land as effectually as if the married woman were alive and were making the conveyance, *i.e.*, free from any claim of the husband. There would be no reason, however, for depriving the husband of his interest, except in the case of a previous contract for sale by the married woman. And so, if an administrator sold to pay debts, the husband should be entitled to elect to take in money out of the surplus the value of his estate by the curtesy.

It is not essential to the complete effect of this section that there should be any *vesting* of the legal estate in the personal representative. Full and sufficient effect may be given by holding merely that the personal representative has a statutory power of dealing with the land. Instances of such powers are not wanting in this Province. Thus, a sheriff or a bailiff of a Division Court who seizes a mortgage may on payment thereof execute a discharge which has the effect of a re-conveyance(*w*). A person appointing a new trustee may by the instrument of appointment declare that the trust property shall vest in the new trustee, without any conveyance(*x*). An executor or administrator may convey, assign, release or discharge a mortgage debt and the mort-

(*w*) Reg. Act, R.S.O. c. 136, s. 83.
(*x*) R.S.O. c. 129, s. 5.

gagee's estate in the land(*y*). Special powers are also given to executors to raise money where there is no sufficient devise of the land to them(*z*). Where there is a direction in a will to sell or dispose of land and no person is appointed to do so, the executors may do so(*a*). An administrator with the will annexed may exercise the like powers(*b*). And where powers of sale, etc., are given in a will and no person is appointed to exercise them, the administrator with the will annexed may exercise them(*c*). And where a contract in writing has been made to sell land, and the vendor dies intestate, or without providing by will for the conveyance, then if the deceased vendor would be liable, if alive, to execute a conveyance, the executor, administrator, or administrator with the will annexed, may make the conveyance(*d*). In all these cases there is no vesting of the estate in the person authorized to exercise the powers. In fact the reason for passing these enactments is that the legal estate is elsewhere than in the persons authorized to exercise the powers. In view of these enactments there seems to be no difficulty in holding that the legislature might repeat its action in this case, and that the personal representative of a married woman has, under this section, statutory powers of dealing with the land to as great an extent as if the land were vested in him, although in fact the legal estate might be elsewhere. And there appears to be no reason for withholding from him the full powers which are indicated by the section.

It will be observed, of course, that no limitation as to time is placed upon the personal representative within which he must exercise his powers. In other words, until

(*y*) R.S.O. c. 121, s. 11; see also s. 13.
(*z*) R.S.O. c. 129, s. 18.
(*a*) Ibid. s. 21.
(*b*) Ibid. s. 22.
(*c*) Ibid. s. 23.
(*d*) Ibid. s. 24.

he releases or conveys the separate estate, or until some statute of limitation operates against the exercise of his powers, it seems that he not only might, but might be compelled to, exercise them.

2. *Since The Devolution of Estates Act.*

As to the second period. From the time of the coming into force of *The Devolution of the Estates Act*, namely, 1st July, 1886, we have two statutes in force respecting the rights of the personal representative of a married woman. The special clause in *The Married Women's Property Act* might well have been dropped, and the separate property of married women allowed to be dealt with in all respects by the personal representative under the general enactment. But as the legislature has thought fit to keep the special enactment in force as to separate property, it entails an examination of the combined effect of both.

In *Boston* v. *Lelièvre*(*e*) Lord Westbury said, "The consolidated statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts." A similar point arose in the case which called for this remark, there being clauses in different statutes which both related to the same subject, one in a general manner, which would, but for the special Act, have covered the case, the other in a particular or special manner to the very case in hand(*f*). If we treat *The Devolution of Estates Act*, and *The Married Women's Property Act* in so far as it relates to the personal representative's rights, as one enactment, the result will be that all the general provisions of

(*e*) L.R. 3 P.C. at p. 162.

(*f*) See also *Pretty* v. *Solly*, 26 Beav. 610; *Le Winton* v. *Brecon*, 28 L.J. Ch. 604; *Churchill* v. *Crease*, 5 Bing. 180, as to general and special enactments.

the general Act will apply to separate estate as well as other land of a married woman, but in addition thereto, the special clause of the particular Act will remain effective in all respects and give the personal representative the special powers as to separate property which are therein set out. Thus, under the general Act, the land would vest in the personal representative; the husband might elect under the general Act; under the particular Act the personal representative might sell at any time without the husband's consent, though the latter might elect to take the value of his curtesy; even if the husband elected to take his curtesy before sale, the personal representative might sell under the particular Act, and compensate the husband by giving him the value of his curtesy; under the general Act the personal representative might register a caution, though this would not be necessary, as his statutory power under the particular Act would suffice for him; under the general Act the land would shift at the end of the year into the beneficiaries; under the particular Act, notwithstanding the shifting, the personal representative would retain his powers(*g*). But these powers, not being limited or fettered in any way as to time or conditions, might be much larger than those of a personal representative acting under the general Act. Thus he might sell on his own discretion notwithstanding that infants were interested, or that beneficiaries had improved the land, or that they might have sold the same; for it seems that if the powers referred to indeed exist under *The Married Women's Property Act* (and they are very plainly writ) no one could get a good title to separate estate without a release or conveyance from the personal representative. It follows that a subsequent caution need not be registered for the personal representative has ample and unlimited powers under the particular

(*g*) Cf. the case of special powers given by will, which are not affected by *The Devolution of Estates Act*, ante, p. 114.

enactment, and in the absence of a release or conveyance by the personal representative there is nothing to deprive him of his special powers respecting separate estate, but the operation of some statute of limitation acting either upon the right of some third person (as barring a creditor) or upon his own powers over the land.

CHAPTER XVI.

Dower and Election.

1. *Dower Preserved.*
2. *Election on Intestacy Only.*
   (i) *Intestacy as to Land Only.*
   (ii) *Election Between Dower and Share in Land.*
3. *Effect of Election.*
4. *Partial Intestacy as to Land.*
5. *Mode of Election.*
6. *Jointure or Settlement.*
7. *Time for Election.*
8. *No Issue—Estate not Exceeding $1,000.*
9. *No Issue—Estate Exceeding $1,000.*

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1. *Dower Preserved.*

Dower is not abolished, but is expressly retained, although the land is to be distributed amongst the next of kin(*h*). But, under certain circumstances, election may be made by a widow to take a distributive share of the realty instead of dower. The words of the Act which preserve dower and provide for election are as follows(*i*):—"Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower in respect

(*h*) The personal representative is the proper person to assign dower: *Allan* v. *Rever*, 4 O.L.R. 309.

(*i*) S. 4, s.-s. 2.

of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed of real estate aforesaid."

As the enactment originally stood, this was the only clause relating to the share of a widow, and in itself it presents no unusual difficulties as to the cases in which election may take place. But in 1895 an Act was passed(*j*), which provides for a preferential allotment to the widow of $1,000 out of realty and personalty combined, upon intestacy without issue, which seems (where the surplus does not exceed $1,000) to preclude the possibility of election in cases which fall within its provisions. This Act is now section 12 of the principal Act and is as follows:—

(1) "The real and personal estate of every man dying, after the 1st day of July, 1895, intestate and leaving a widow but no issue, shall in all cases where the net value of such real and personal estate does not exceed $1,000, belong to his widow absolutely and exclusively.

(2) Where the net value of the real and personal estate of any person who shall die intestate as in this section mentioned shall exceed the sum of $1,000, the widow of such intestate shall after payment of debts, funeral and testamentary expenses and expenses of administration, be entitled to $1,000, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estate, after payment as aforesaid, for such $1,000, with interest at 4 per cent. per annum until payment.

(3) The provision for the widow intended to be made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal estate of the intestate remaining after payment of the

(*j*) 58 V. c. 21.

sum of $1,000 and interest as aforesaid, in the same way as if such residue had been the whole of the intestate's real and personal estate, and this section had not been enacted."

It will be observed that this section applies only to cases where the intestate husband leaves no issue. The special provision for distribution thereunder seems to preclude the possibility of election between dower and her interest under the enactment (where the surplus does not exceed $1,000), but before entering into an examination of this clause it will be necessary to ascertain the conditions under which election does take place under section 4.

2. *Election on Intestacy Only.*

The primary and fundamental principle underlying this enactment (section 4) is that the widow takes no share in the distribution of realty except by her own choice. Her primary right is her dower. If she elects to take a distributive share in the realty in lieu of dower she may do so; but if she does not elect to share in the distribution she takes no share.

This clause applies only to cases of intestacy. In *Cowan* v. *Allen*(*k*), Strong, C.J., said, "It is claimed on behalf of Mrs. Cowan, the widow of Alexander, that under *The Devolution of Estates Act* she is entitled to elect between her dower and a distributive share of the devised land. This claim is wholly unsustainable; the Act applies only to the case of the descent of the inheritable lands of an intestate; here, there is no devolution by way of descent, for the estate devised to the husband, Alexander, immediately upon his death without issue vested in the devisees entitled under the gift over."

(*k*) 26 S.C.R. at p. 314.

(i) *Intestacy as to Land Only.*

It seems, however, that the intestacy need only exist as regards the land. The election is to be between all claims to dower and her share in the *land* undisposed of. Her rights with regard to personalty are unaffected; and her right of election between dower and her statutory share in the land stands alone.

And so it was assumed in *Baker* v. *Stuart*(*l*), for the point was not raised. In that case the testator bequeathed all his personal property to his wife. He then directed his executors to lease and rent his lands for the term of sixty years, and then divide them in a certain manner. This direction was held to be void, and as there was no residuary devise there was a complete intestacy as to the lands, though the widow took all the personalty under the will. She then claimed a distributive share in the realty (which was, in this event, undisposed of) in lieu of dower, and her claim was allowed.

(ii) *Election Between Dower and Share in Land.*

As has already been stated, the election to be made is between all claims to dower and the widow's "interest under *this section* in her husband's undisposed of real estate." There is nothing in section 4 as to the widow's interest, except the enactment in the first sub-section that the property is to be "distributed as personal property not so disposed of [*i.e.*, by deed, will, contract or other effectual disposition] is hereafter to be distributed." The effect of this enactment is that if the land is not disposed of by will, and is not subject to the terms of a deed or contract, it is to be distributed as personalty is to be distributed; and so the widow would, in the course of distribution, get her share under the *Statute of Distribution*. It is between this share

(*l*) 29 Ont. R. 388; 25 App. R. 445.

under the Statute of Distribution, as modified by the present Act, and her dower, that the widow is to elect. The land, for this purpose, is treated as entirely distinct from personalty.

In cases of intestacy realty and personalty are, for purposes of administration, still considered as distinct funds, the personalty being the primary, and the land the secondary, fund for payment of debts. As long as the personalty is sufficient to pay the debts, the land will be left free, and the widow may make her election between dower and a distributive share in the land. But if the land has to contribute to the payment of debts, the residue thereof, after the contribution is made, is what becomes available for distribution, and it is in that residue that she must take her share if she elects to take it instead of dower. It may therefore be prudent for her in such a case to elect in favour of her dower, which she is entitled to before the land can be resorted to for debts.

3. *Effect of Election.*

If she elects to take her distributive share under the statute, she must abandon "all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled." The result of this is curious. She not only abandons her right to dower in the land which forms part of his estate, and is in course of distribution, but also in all other land of which her husband was at any time seised. If her husband had, in his lifetime, conveyed dowable land without a bar of dower, the widow, if she elects to take a distributive share in land undisposed of by him upon his death intestate, must give up her dower in the land so conveyed in his lifetime, to the profit and for the benefit of a stranger to the estate. It is not easy to see the purpose of this, but the meaning is unmistakable; she elects to take her share

in the undisposed of realty, and abandons, not her dower in the same land, but all claims to dower in land of which her husband was at any time seised or to which he died beneficially entitled.

4. *Partial Intestacy as to Land.*

Where there is a partial intestacy as to land, this section is difficult of application. If the enactment had made each parcel of land of which she is dowable the subject of an election, *i.e.*, if she could have chosen a share in each parcel instead of her dower therein, there would have been no difficulty. But she is not allowed so to choose. If she elects, she must elect to take a share in the whole undisposed of realty, and if she so elects she must give up all claims of dower, not only in the undisposed of realty, but in all other lands in which she might claim dower. Thus, if a testator should specifically devise Whiteacre, and die intestate as to Blackacre, and his debts were all paid out of personalty, his widow would be entitled to dower in both Blackacre and Whiteacre. But if she claimed a distributive share in Blackacre in lieu of dower, she would have to give up her dower in Whiteacre. This enures to the benefit of the devisee of Whiteacre, who may not be interested at all in the distribution of Blackacre, and to the detriment of those entitled in course of distribution to Blackacre, who have no recourse against Whiteacre(*m*).

5. *Mode of Election.*

The election may be by deed, or simply by an instrument in writing, in either case attested by at least one witness. As the Act prescribes this mode of election no other can be resorted to; and therefore, where land was sold, under the Act respecting infants, free from dower, and the

(*m*) See the dictum of MacMahon, J., in *Rudd* v. *Harper*, 16 Ont. R. at p. 428. *Sed quaere.*

purchase money was paid into court, and the widow by her solicitor applied to the court for a distributive share in lieu of dower, it was held that she must produce an attested instrument in writing signifying her election as required by the Act(*n*).

The election may be made by will(*o*). But any instrument of election must contain a clear election and not simply assume ownership in the land. Thus, in a case of *Thompson* v. *Mills*(*p*) the facts were that one Mills died intestate on 1st June, 1892, leaving a widow but no children. The widow, on 2nd June, 1892, made a mortgage in fee of land to which her husband died entitled, containing the following recital:—"Whereas in consequence of the death of the said R. M. intestate, without leaving a child or children as aforesaid, the said M. M. [the widow] became entitled to the undivided half of the lands of her deceased husband for her own absolute use, and it has been agreed that in consideration of the loan hereinafter set out from the mortgagee to the mortgagor this mortgage shall be given to cover the whole interest of the party of the first part [the widow] in the land aforesaid." The instrument then purported to grant an undivided one-half interest in the land in fee. In partition proceedings, the court held that the widow had not, by the execution of the mortgage, made any election to take an undivided one-half interest in the land. She merely assumed that she became immediately entitled to a one-half interest; whereas her share to which she would have been entitled if she had elected would have been a one-half interest in the *proceeds* of the estate after all debts had been paid. As it did not appear that she

(*n*) *Re Galway*, 17 P.R. 49.

(*o*) *Re Ingolsby*, 19 Ont. R. 283.

(*p*) Decided by a Divisional Court composed of Meredith, C.J., and Rose, J., on 10th June, 1896, unreported, in which the writer was one of the counsel.

elected to take this, but assumed that she was owner of a one-half interest in the *land* itself, it could not be considered an election.

Although an election must be made according to the statutory requirements, still a widow might by her conduct estop herself from election(*q*).

6. *Jointure or Settlement.*

The widow must of course have a right to dower in order to entitle her to claim a distributive share in lieu thereof. And so, where she has a jointure(*r*), or where she has accepted a settlement in lieu of dower(*s*), she cannot claim a distributive share under the Act.

7. *Time for Election.*

The widow is not by the Act expressly limited as to the time within which she may make her election. Inasmuch as her share, if she elects to take it, is a share in the proceeds of the estate after all the debts and expenses of administration are paid, she is entitled to a reasonable time in order to ascertain how the estate will turn out, and which course is most to her advantage; and consequently she may elect at any time that the exigencies of administration will permit(*t*). And there seems to be no reason why, even if the land should shift into the beneficiaries, she should not still elect to take a share. For, by the automatic action of the statute in vesting the land in those who are entitled to it, no person's rights are taken away; rather does the vesting operate in fulfilment of rights. And as the heirs take subject to the dower, they must also take subject to its equi-

(*q*) See *Rudd* v. *Harper*, 16 Ont. R. 422.
(*r*) See *Eves* v. *Booth*, 29 App. R. 420.
(*s*) *Toronto Gen. Trusts Co.* v. *Quin*, 25 Ont. R. 250.
(*t*) *Baker* v. *Stuart*, 29 Ont. R. 388; 25 App. R. 445.

valent, as long as the widow is not debarred from asserting her claim either by lapse of time or conduct inconsistent with her claim to a share.

In the course of administration, it is usual for the sale of land to be made free from dower with the consent of the widow; and she does not thereby forfeit her right to dower(*u*), but may still elect either to have her dower or her share under the Act. But provision is made by the Act for sale free from dower. In such a case, an application may be made in a summary way to a judge of the High Court upon evidence, for an order for sale, and if the judge approves he may make an order that the personal representative shall sell free from the right of the doweress. The order is not to be made *ex parte* unless service upon the doweress cannot conveniently be made. When an order is made the conveyance to the purchaser need not contain a release of dower, but all the interest of the doweress will pass by the conveyance, and the purchaser will hold the land freed and discharged from all claims of the doweress. The judge may direct payment to the widow of a sum in gross, or of an annual sum, in satisfaction of the doweress' right(*v*).

If the widow consents to release her dower resort need not be had to this section. But if she refuses to release, and requires, as she has a right to do, that her dower be assigned to her by metes and bounds, it will be seen that this enactment is very far reaching, for under it the court may take away a property right which has always heretofore been jealously guarded. No doubt, where a widow insists upon an assignment of dower, the power to deprive her of the exercise of her right would be most sparingly exercised by the court, if at all, and then only in cases of urgency.

(*u*) See *Re Rose*, 17 P.R. 136.
(*v*) S. 11.

8. *No Issue—Estate not Exceeding $1,000.*

Where the husband dies intestate and leaves a widow but no issue, distribution is to be made under section 12. It has been already stated that the conditions of this section seem to preclude the possibility of election by the widow between dower and a distributive share. The consequence of this must be either that dower is abolished in all cases coming under section 12, or that it is not abolished, but being retained the widow takes it, and in addition, takes the provision made for her by this section.

In dealing with the share or interest of the widow of an intestate, it must be borne in mind that, where there is any dowable land, the dower of the widow in it is her own property, which she cannot be divested or deprived of without her own consent, and which, being her own property, is not subject to the debts of her deceased husband. If the widow is not to have her dower in dowable land, it must be because it is expressly taken away from her. But the clause which deals with dower(*w*) expressly preserves it by the words, "Nothing in this Act shall be construed to take away a widow's right to dower." And as the Act of 1895, giving the widow a preferential payment in course of distribution, is now part of the principal Act, its incorporation in the principal Act is not to be construed as taking away the right to dower. The right to dower being expressly preserved, the next enquiry is whether the widow must elect between dower and her distributive share when distribution takes place under section 12.

It might be urged at first sight that as the widow takes the whole net estate when it does not exceed $1,000, this is so inconsistent with her claim to dower that she must, by force of circumstances, elect between her dower and this share—in other words, that dower is impliedly abolished in these

(*w*) S. 4, s.-s. 2.

cases. It is a complete answer to this, however, to say that by section 4 dower is expressly preserved; and therefore it cannot be impliedly abolished. And it will be found on examination that the claim of dower is not inconsistent with the provisions of section 12, while the conditions of that section are not favourable to election. As a bare matter of construction, by comparison of the two sections, 4 and 12, it might be sufficient to say that, as election is to take place only if a widow desires her share "under this [*i.e.*, the 4th] section," and as nothing is said in section 12 about either dower or election, it is only in cases falling under section 4 that she is to elect. But further examination will disclose other reasons and will show that the only provisions as to election in the Act, being those contained in section 4, are such that they cannot be applied to the circumstances of section 12.

The first observation to be made with regard to section 12 is, that, whereas under section 4 dower is the widow's primary right, and the widow can only *by choice* take a distributive share and abandon her dower; under section 12 the payment of $1,000 is the only right, and does not depend upon choice or election at all. And as the widow's dower is already her own by law, any benefit given her by the Act must be in addition to it, as it is not said to be in lieu of it. In other words, while under section 4 she must abandon her dower in order to take a share in course of distribution under that section, under section 12 she is not obliged to abandon it, but may, or rather must(x), take her share without that condition. In other words section 12 gives no choice and imposes no conditions.

Next, it is to be noticed that while cases of partial intestacy, *i.e.*, an intestacy as to land only, or part of the land,

(x) It is not meant by this that the acceptance of the share is compulsory, but that under section 4 the share comes by choice, while under section 12, by right under the statute.

are within section 4, section 12 applies only to the case of a complete intestacy, *i.e.*, intestacy as to both land and personalty(*y*). Election, when it takes place, is between dower and a share in the *realty*—the title to personalty being distinct and entirely unaffected by the course which the widow may take as to the land. But under section 12 the real and personal property are funded or consolidated; the preferential payment to the widow depends upon a complete intestacy and is then made up out of real and personal property blended into one fund. No such election could therefore take place as is provided for by section 4. The realty cannot be separated from the personalty when distribution takes place under section 12, and without such separation the conditions for election prescribed by section 4 are absent.

It seems, therefore, that when cases arise which fall under section 12, the widow is compe[illegible] take the interest provided thereby. To require her, or [illegible]llow her, to elect to take dower in lieu of this provision, would be to require or allow her to reject the application of section 12 altogether, for which there is no authority. She has no choice, and saying that she has no choice is merely saying that she is not to elect. Neither is the provision made by this section conditional. She gets her interest without being obliged to comply with or perform any condition. She is already entitled to dower, and as there is nothing in the Act to deprive her of it in cases falling within section 12, the benefit given by the Act must be in addition to it.

Again, the share which the widow gets under section 12, is a preferential payment out of the net proceeds of the estate, after payment of all outgoings. If the widow were held not to be entitled to dower in cases falling within this section, it would condemn her in every case to surrender her

(*y*) *Re Twigg's Estate*, L.R. (1892) 1 Ch. 579; *Re Harrison*, 2 O.L.R. 217.

common law right of dower in order to pay creditors, and to take the whole risk of the administration in order to get a share in the estate, and this too under a clause which is unintended to benefit her.

The claim of dower is not inconsistent with the provisions of this sub-section. If it should transpire, in the course of administration, that it will result in the insolvency of the estate, there is nothing inconsistent in the widow's asserting her right to dower, which would in that case be her only provision. Indeed, her dower is no part of the estate at all. And so in all gradations from insolvency up to the production of a surplus of $1,000, the principle is the same; there is no inconsistency in administering the estate by providing for her dower first, then paying the debts and expenses of administration, and then valuing the surplus (in which the reversionary value of the land in which she takes dower will be included), and then, if the surplus does not exceed $1,000, paying the whole to her. If the surplus without deducting the value of her dower would exceed $1,000, but after deducting it, would not exceed $1,000, it would of course be more profitable for her to claim her dower, and there seems to be no reason why she should not. Upon payment to her of the surplus where it does not exceed $1,000, administration is complete, for the whole surplus belongs to the widow "absolutely and exclusively."

9. *No Issue—Estate Exceeding $1,000.*

But where the surplus, or net value of the estate, exceeds $1,000, the widow is entitled only to a *preferential payment* of $1,000, and the residue is to be distributed as if it were the whole of the estate, and as if section 12 had not been passed. In other words, after payment of debts and cost of administration, the widow stands in the position of a person having a lien on the estate for $1,000; she does not own the $1,000 or any part of the estate of equiva-

lent value "absolutely and exclusively" as she does where the net value does not exceed $1,000. Distribution takes place, after payment of this sum, under section 4, which directs realty to be distributed as personalty, and which directs that a widow shall not share in the realty unless she abandons all claims to dower. This points to the result that the widow after receiving her preferential payment of $1,000 must elect to take a share in the realty by abandonment of dower if she desires it, but is entitled to her distributive share in the personalty as of right. The land and personalty are funded under this sub-section, only for the purpose of rendering them subject to a lien for $1,000 in favour of the widow. When that sum is paid, they become subject to the provisions of section 4, which gives the widow dower as her primary right, and gives her a share in the realty only if she abandons her dower.

The widow, as we have seen, may always reserve her election until she is fully informed of how the estate is going to emerge from the administration, and there is therefore no practical difficulty in applying any one of these enactments. When the debts and assets are ascertained it is possible for the widow to know whether there is going to be a surplus of $1,000 or not. If it appears that the estate will have little or nothing in it after payment of debts, she may choose to claim her dower or its value. If it shows a surplus exceeding $1,000 by the value of her dower but no more, she may claim dower first and then the surplus. But if the surplus exceeds $1,000 and the value of her dower, she becomes entitled, as a lien holder, to a preferential payment of $1,000 *before distribution begins*; and as distribu- takes place under section 4, she must take her dower unless she elects to abandon it and take a share in the realty in lieu thereof.

CHAPTER XVII.

The Widow's Share.

1. *Issue of Husband.*
   - (a) *Dowable Land.*
   - (b) *Estates* Pur Auter Vie.
2. *No Issue.*
   - (a) *Dowable Land—Net Estate $1,000.*
   - (b) *Dowable Land—Net Estate Exceeding $1,000.*
   - (c) *Estate* Pur Auter Vie.
3. *Jointure or Settlement.*
4. *Provision by Will in Lieu of Share.*

Where the property is dowable, the widow is entitled to her dower therein.

Where there is no issue of the husband, as we have seen, distribution takes place under section 12, according to the special provisions of that section.

But section 4 is still operative for all cases of distribution where there is issue of the husband, and for all cases where there is no issue and there is property remaining for distribution after payment of debts, expenses and $1,000 to the widow.

The subject must therefore be dealt with under the following conditions:—

1. Where there is issue of the husband;
   - (a) Dowable land;
   - (b) An estate *pur auter vie.*

2. Where there is no issue of the husband;
   (a) Dowable land; net estate, real and personal, not exceeding $1,000.
   (b) Dowable land; net estate, real and personal, exceeding $1,000.
   (c) Estate *pur auter vie*.

1. *Issue of Husband*—(a) *Dowable Land.*

Where the land is dowable the widow takes her dower only. If she elects to abandon it, then the land, which is to be distributed as personal property is distributed(*z*), will go, under *The Statute of Distribution* in the proportions of one-third of the surplusage after payment of debts, to the wife, and two-thirds to the issue(*a*). If she does not elect to take a share she gets no interest in the land but her dower.

(b) *Estates* Pur Auter Vie.

As there is no dower in estates *pur auter vie*, and as these estates are included in the provision for distribution, the widow will take one-third of the surplusage after payment of debts, the remaining two-thirds going to the issue.

2. *No Issue*—(a)*Dowable Land; Net Estate $1,000.*

In this case, the whole estate, real and personal, after payment of debts and expenses of administration, belongs "absolutely and exclusively" to the widow(*b*).

The debts and expenses of administration have first to be paid, before the net value can be ascertained. But, as we have seen(*c*), there is nothing to compel the widow to elect between dower and this surplus, or to deprive her of

(*z*) S. 4, s.-s. 1.
(*a*) R.S.O. c. 335, s. 2.
(*b*) S. 12, s.-s. 1.
(*c*) Ante p. 225.

her right of dower. And, therefore, in this case, she is entitled to dower, and also to the whole of the estate, real and personal, if any, remaining after deduction of her dower, and payment of debts and administration expenses.

(b) *Dowable Land; Net Estate Exceeding $1,000.*

Where it appears that the estate will produce a surplus of real and personal property exceeding $1,000, the widow is entitled to a preferential payment of $1,000, with interest thereon at four per cent. per annum from the date of the death of her husband until payment(*d*); then distribution of the residue takes place as if this section had not been passed, and, irrespective of any other benefit that the wife is entitled to (as a share of property under the laws of a foreign country(*e*)), she is entitled to share in the residue as if it were the whole estate of the intestate(*f*).

As the distribution then proceeds under section 4, the provisions as to dower become applicable and the widow is entitled to dower; but she may elect to abandon it and take a distributive share, in which case she will take one moiety under *The Statute of Distribution*(*g*) and the other moiety will go to the next of kin. If there are no next of kin, one moiety goes to the widow and the other to the Crown(*h*).

(c) *Estate* Pur Auter Vie.

As there is no dower in these cases, no question of election arises. If such an estate forms part of the distributable surplus, and the whole does not exceed $1,000, it all belongs

(*d*) S. 12, s.-s. 2.

(*e*) *Sinclair* v. *Brown*, 29 Ont. R. 370. But not of course irrespective of a provision in lieu of dower or a distributive share, as to which see post p. 236.

(*f*) S. 12, s.-s. 3.

(*g*) R.S.O. c. 335, s. 2.

(*h*) *Cave* v. *Roberts*, 8 Sim. 214.

to the widow. If the surplus exceeds $1,000, that sum is to be paid to her; and of the residue she is entitled to one moiety, the other going to the husband's next of kin, or to the Crown for want of them.

3. *Jointure or Settlement.*

The widow, in order to share, must not have disentitled herself to either dower or a share in her husband's estate. Though the right to dower is not made essential in order to purchase (so to speak) a distributive share by surrendering it, yet if she has already received the prospective value of her dower by settlement, she is treated as if she had already made her choice in favour of dower by anticipation. Thus in one case(*i*) the wife had, by ante-nuptial settlement, accepted a sum of money in lieu of all right to dower; her husband died intestate, and she claimed a distributive share in his estate; and it was held that as she had already renounced her right to dower for a valuable consideration, she could not so take its appraised value and also the benefits conferred by the Act on condition of surrender of her dower.

It might also be argued that the statute itself forbids any other course. For the enactment directs the distribution of land only "so far as the said property is not disposed of by deed, will, *contract*, or other effectual disposition." When there is a settlement or other contract not to claim dower, although the land is not "disposed of" thereby in absolute terms, yet, as far as the widow is concerned, she has by her contract disposed of her dower; and as long as the land is affected by her contract, so as to be disposed of as far as she is concerned, it can only be distributed so far as it is *not* disposed of—that is, always as affected by her agreement, which has in advance freed it from dower.

(*i*) *Toronto Gen. T. Co.* v. *Quin*, 25 Ont. R. 250.

Dower may be barred by jointure(*j*), which is defined by Coke as "a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least"(*k*). At common law a jointure was no bar to dower; but by *The Statute of Uses*(*l*) a jointure made before marriage is a complete bar to dower; but if made during the coverture and it be a legal jointure within the Act, then, if the wife survives she may refuse the jointure and elect to take her dower(*m*).

If the jointure were not one within the Act, then a court of law could not compel the widow to elect between the jointure and dower, because at common law a jointure was no bar to dower(*n*). But in equity the wife could not hold the jointure and also claim her dower(*o*), and the practice in equity would no doubt now prevail. Hence, wherever the wife is entitled to a jointure, whether made before or after marriage, it is a bar to dower, but if the jointure is within *The Statute of Uses* and be made after marriage, the wife, surviving her husband, may elect in favour of dower, and may then elect to surrender her dower for a distributive share in the estate. If the jointure be after marriage and not within the Act, she will not, in equity, be entitled to claim both, but may elect in favour of dower; and again between dower and a distributive share.

(*j*) In *Eves* v. *Booth*, 27 App. R. 420, a provision made for a wife in a separation deed was treated as a jointure. *Sed quaere*, for a jointure is in the nature of a settlement whereby a provision is made for the matrimonial status, while a separation contract, being a *quasi* divorce, makes a provision for a suspension of matrimonial relations.

(*k*) Co. Litt. 36 b, 37. See further as to the essentials of jointure, 2 Rop. Husb. & Wife, 2nd ed. pp. 464, *et seq.*

(*l*) Now R.S.O. c. 331, ss. 5. 6 and 7.

(*m*) R.S.O. c. 331, s. 7.

(*n*) See 2 Rop. Husb. & Wife, 2nd ed. p. 470.

(*o*) Ibid.

So, also, it has been frequently held that a wife may by contract or settlement deprive herself of a right to share in the personal estate of her husband upon distribution under *The Statute of Distribution*(*p*), and as land is now to be distributed as personalty, under section 4, and with personalty in the specific manner provided by section 12, a similar contract or settlement will bar her right to her distributive share in the land.

She may also, by appropriate words in a deed of separation deprive herself of future benefits from the husband's estate(*pp*).

Where the case falls under section 4, and the settlement deprives the wife of her dower, she cannot, as we have seen, claim a distributive share, which comes to her under this section only by election upon abandoning her dower. And, therefore, a settlement in lieu of dower also bars the widow's right to a distributive share.

But where the case falls under section 12, sub-section 1, and the widow is entitled to dower and also to the whole surplus of the estate after payment of debts and expenses of administration, there must be words in the contract sufficient to exclude her right to the statutory provision as well as dower(*q*).

Where the case falls under section 12, sub-sections 2 and 3, and the widow is entitled first to a preferential payment, and then to a distributive share under section 4—that is to say—when she is entitled absolutely to a preferential payment, and conditionally to a share in the estate, she would, under a settlement barring her *dower*, still be entitled to the preferential payment, which is not conditional upon her giving up dower; but she would not be able to share in the

(*p*) *Gurly* v. *Gurly*, 8 Cl. & F. 743; *Druce* v. *Denison*, 6 Ves. 385; *Thompson v. Watts*, 2 J. & H. 291.

(*pp*) *Eves* v. *Booth*, 27 App. R. 420.

(*q*) See *Druce v. Denison*, 6 Ves. 385, at pp. 394, 395.

residue. From the nature of this peculiar provision, it would require very comprehensive words to deprive her of both benefits.

4. *Provision by Will in Lieu of Share.*

Where the husband makes a provision by will for his widow in lieu of her share of his personal estate, and then disposes of his personalty by will, and the disposition lapses, or is void, so that the personalty becomes distributable, it is held that the widow is entitled to the provision made for her by the will, and also to a share in the lapsed legacy under *The Statute of Distribution*(*r*).

For in such a case the widow is deprived of her share only to benefit the particular legatee, and if that benefit cannot take effect on account of the lapse, thus producing a legal intestacy, there is no reason for excluding the widow any longer. "Nothing is more clear than that where an exemption is created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises"(*s*).

But it is apprehended that the principle of these decisions cannot apply in its entirety to cases of land under this statute. For instance, if a testator died entitled to dowable land, and by his will gave his widow a legacy in lieu of dower, and then disposed of his land to a devisee who predeceased him, and, not making a residuary disposition, died intestate as to the land, the widow would be obliged to elect between her dower and the legacy; and, if she accepted the legacy, she would have to give up her dower as the price of it, and could not again give it up (as the statute requires) for a distributive share. If she does not surrender her

(*r*) *Pickering* v. *Stamford*, 3 Ves. 332, 492; *Gartshore* v. *Chalie*, 10 Ves. at pp. 17, 18.

(*s*) Per Sir R. P. Arden, M.R., in *Waring* v. *Ward*, 5 Ves. at p. 676.

dower, but prefers to take it, then she cannot take a distributive share in the land.

It appears, therefore, that in such a case she would not share in the distribution.

In cases where the will shows an intention to exclude the widow altogether in case of intestacy, and not merely for the purpose of providing for a particular legatee, it has been held that the above principle will not apply, and she is confined to the provision given her by the will, even though there is an intestacy in other respects(*t*).

But here, again, if the testator gives her the legacy, for whatever cause, in lieu of dower, she is put to her election between dower and the legacy, and she can only give up her dower for the legacy, or take her dower and abandon the legacy. And if she takes her dower she cannot take a distributive share in the land.

Where, however, the will fails entirely, the property is distributed under *The Statute of Distribution*, and subject to its terms(*u*).

(*t*) *Lett* v. *Randall*, 3 Sm. & G. 83.
(*u*) *Re Ford*, L.R. (1902) 1 Ch. 218.

CHAPTER XVIII.

THE HUSBAND'S SHARE.

1. *The Marital Right.*
2. *Effect of Legislation Thereon.*
3. *Curtesy and Election.*

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1. *The Marital Right.*

At common law the husband, at his wife's death, succeeded to all her personal estate which had not been reduced into possession by him during the coverture. And he so succeeded *jure mariti* simply, and not by reason of his becoming her administrator. *The Statute of Distribution* did not affect this right in any way, and indeed it was subsequently declared by the *Statute of Frauds*(*v*) that *The Statute of Distribution* should not extend to the estates of *feme coverts*, but their husbands should demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of *The Statute of Distribution*. Even if administration were granted to the next of kin of the wife, the administrator was held to be a trustee for the husband, or his legal personal representative. And the husband's title being absolute, passed even to his assignees in bankruptcy(*w*). If the property of the wife were separate estate, and had not been disposed of by the wife by instrument *inter vivos* or by will, it passed to the husband in

(*v*) 29 Car. II. c. 3, s. 25.
(*w*) *Re Lambert's Estate*, 39 Ch. D. at p. 630.

his marital right as if the separate use had never existed(*x*).

That being the course of devolution at common law on the wife's death, it is necessary to ascertain how far that law has been affected by provincial legislation.

2. *Effect of Legislation.*

At a very early period, the *separate* personal property of a wife dying intestate was made distributable in the same proportions between her husband and children as the personal property of a husband dying intestate was distributed amongst his wife and children; and if there were no child or children living at the death of the wife, then the property devolved as if the Act had not been passed(*y*). Thus property which was not separate estate still passed to the husband *jure mariti,* property which was separate estate passed to the husband in the same right if there were no children, but if there were children it was distributed by the administrator, one-third to the husband, and two-thirds to the children in equal shares.

This enactment was carried through two revisions of the statutes of Ontario(*z*), and indeed remained in force until repealed in 1897(*a*). In 1886, when *The Devolution of Estates Act* was passed(*b*), it was enacted as follows:—"The real and personal property of a married woman in respect of which she has died intestate, shall be distributed as follows: one-third to her husband if she leave issue, and one-half if she leave none; and subject thereto, shall go and devolve as if her husband had pre-deceased her."

(*x*) Ibid. at p. 633; see also *Surman* v. *Wharton*, L.R. (1891) 1 Q.B. 491.

(*y*) C.S.U.C. c. 73, s. 17.

(*z*) R.S.O. (1877) c. 126, s. 25; R.S.O. (1887) c. 132, s. 23.

(*a*) 60 V. c. 14, s. 33.

(*b*) 49 V. c. 22, s. 5.

Inasmuch as by the same Act(*c*) land is to be distributed as personalty, the effect of this is to give the husband one-half if there be no issue (which would include descendants of children as well as children) and one-half to the next of kin of the wife under *The Statute of Distribution.* Thus the husband's marital right to succeed to his wife's property has been taken away. Inasmuch as the enactment first mentioned was still in force, and specifically affected *separate personal* property only, the enactment in *The Devolution of Estates Act* must be taken to apply to all land, whether separate estate or not, and to all personalty which was not separate estate, if any there was at that time.

In 1897, the following enactment was passed(*d*) :—"The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue; and, subject thereto, shall go and devolve as if her husband had pre-deceased her"(*e*). This is substantially the same section as that which appeared in *The Devolution of Estates Act,* but it includes both separate property and property which is not separate. At the present time, therefore, all land of a married woman passes to her administrator for distribution in the manner mentioned. If it is separate estate, the administrator has "the same rights and liabilities" and is "subject to the same jurisdiction as she would have or be if she were living." He must therefore answer her engagements made respecting her separate estate(*f*).

Subject thereto, the administrator distributes as before mentioned.

(*c*) S. 4.
(*d*) 60 V. c. 14, s. 32.
(*e*) Now R.S.O. c. 127, s. 5.
(*f*) *Surman* v. *Wharton*, L.R. (1891) 1 Q.B. 491.

3. *Curtesy and Election.*

The primary right of the husband is to take his distributive share under this enactment. But he may elect "to take such interest in the *real and personal* property of his deceased wife as he would have taken if the said sections (3 to 9) had not been passed," provided that the circumstances are such that he would have been entitled to an interest as tenant by the curtesy in any real estate of his wife, in which case he may elect against the Act(*g*).

It has already been pointed out that there must be a complete intestacy as to both realty and personalty in order to enable or entitle the husband to elect, because if he elects he must elect to take such interest in the real and personal estate as he would have taken if the Act had not been passed, which he could not do unless there was an intestacy as to both kinds of property(*h*).

Consequently, where there is a disposition by will of realty, which is not separate estate, and an intestacy as to personalty, the husband is entitled to curtesy only in the land if the other conditions are present, and his share of the personalty.

If there is an intestacy as to land, whether separate estate or not, and a disposition by will of personalty, the husband is barred of his curtesy and takes one-third of the land, if the wife leaves issue, and one-half if she leaves none, and the residue goes to the issue or next of kin, as the case may be.

Where there is an intestacy as to both realty and personalty, he takes one-third or one-half, according to whether there is or is not issue of the wife's. But in this case, if the circumstances are such that he would (but for the Act) have been entitled to curtesy in any land of his wife's, he

(*g*) R.S.O. c. 127, s. 4, s.-s. 3.
(*h*) See ante, p. 200.

may elect to take the interest in both realty and personalty which he would have taken before the Act. In other words, he may elect against the Act altogether. If the Act had not been passed his only interest in the realty would have been his estate by the curtesy in such land as was subject thereto.

The husband may by his contract deprive himself of all right to share in his wife's estate(*i*).

(*i*) *Dorsey* v. *Dorsey*, 29 Ont. R. 475; 30 Ont. R. 183.

CHAPTER XIX.

Children and Their Representatives.

1. *Changes in Succession by D. E. Act.*
2. *Present Mode of Computing Degrees.*
3. *Mode of Distribution.*
   - (i) *Children Only.*
   - (ii) *Descendants of Children Only.*
   - (iii) *Children and Descendants of Children.*

The classes of persons entitled to share in the distribution, after allotment to husband or wife, as the case may be, are two—lineal and collateral relatives; that is to say, children and their legal representatives, being lineal descendants, and in default of children, the nearest of kindred, or next of kin, and their legal representatives, being collaterals. But they do not share together. Children and their representatives take the whole estate. And it is only when there are no children and no representatives of children that collaterals become entitled. If there is no husband or wife to share, then the children or their representatives take the whole.

1. *Changes in Succession by D. E. Act.*

Before entering upon an examination of the subject in detail, it may be opportune at this point to call attention to the complete change in succession to land which has been brought about by this legislation. Accustomed for many years, under the Inheritance Act, to a division of land amongst children and their descendants, and to a similar

division amongst collaterals of the nearest degree, and accustomed also, in the great majority of cases, to find that the heirs at law under the Inheritance Act and the next of kin under *The Statute of Distribution* were the same persons, and knowing also that it is expressly enacted that on failure of heirs under the rules of the Inheritance Act, the land is to descend according to *The Statute of Distribution*(*j*), we are apt to be lulled into the idea that there is no difference between descent under the Inheritance Act, and distribution under *The Statute of Distribution,* as regards the persons entitled to share, and the proportions in which they take, but that the persons entitled and the mode of division are in each case identical. It will be found, however, that very important distinctions exist.

In the first place, the preference, in some cases, of the blood of the purchaser, which existed under the Inheritance Act, has no place under *The Statute of Distribution.* When the estate "came to the intestate on the part of the father or mother" special rules for descent were provided by the Inheritance Act(*k*).

Again, the relatives of the half-blood, and their descendants, were, under the Inheritance Act, admitted equally with those of the whole blood, unless the estate came to the intestate by descent gift or devise from some one of his ancestors, in which case those who were not of the blood of that ancestor were excluded(*l*). Whereas the half-blood are admitted under *The Statute of Distribution* without any such condition, for reasons which will shortly be mentioned.

Again, where an intestate left no issue, but left brothers or sisters and a father or mother, the estate, under the Inheritance Act, went to the father or mother for life, and

(*j*) R.S.O. c. 127, s. 55.
(*k*) See R.S.O. c. 127, ss. 40, 45, 46, 50, 52, 53.
(*l*) R.S.O. c. 127, s. 54.

the reversion to the brothers and sisters(*m*). This notion of a settlement of the estate is entirely foreign to a system of absolute distribution, or immediate division, of personalty in which there are no estates, and where the property is divided amongst several, once for all, and a share allotted to each person absolutely. And where this state of facts now occurs, the land will no longer be disposed of under the special rules of the Act, but will be distributed as if it were personalty, according to a different rule.

Again, where the persons entitled are lineal descendants in equal degree of consanguinity to the intestate (not being children), the modes of distribution of the two systems are entirely different. Thus, under the Inheritance Act, where all the descendants are of equal degree of consanguinity to the intestate (however remote they may be), they share equally *per capita* (*n*).

But under *The Statute of Distribution* they take *per stirpes*, deriving their shares always from the *children* of the intestate, the share which each child would have taken (if they had all survived), being transmitted to that child's descendants by representation (*o*).

2. *Present Mode of Computing Degrees.*

Finally, the method of computing degrees of consanguinity is entirely different under *The Statute of Distribution* from the mode at common law. The method of computing degrees for purposes of descent at common law was that in use in the canon law; thus, beginning at the common ancestor, the degrees were counted downwards through each direct line to the two persons related, and in whatever degree the two persons, or the more remote of them, were or was distant from the common ancestor, in that degree were

(*m*) R.S.O. c. 127, ss. 45, 46.
(*n*) Ibid. s. 42.
(*o*) See post, p. 249.

they related. Thus, brothers are related in the first degree, because each is one degree from the common ancestor. Uncle and nephew are related in the second degree, because, while the uncle is but one degree distant from the common ancestor, his nephew is two degrees distant, and the more remote degree determines the degree of the relationship(*p*).

But, under *The Statute of Distribution*, the degrees are computed according to the civil law(*q*), according to which, the degrees are reckoned from one of the parties up to the common ancestor, and then down to the other; and the sum of the two gives the degree in which the parties are related(*r*). Thus brothers are related in the second degree; and uncle and nephew in the third degree. The result of this is more than a mere difference in notation of the same relationship; for, as we count *through* the common ancestor, the relationship to *him* of the several parties is an important factor. And we shall see that this mode of reckoning includes the half-blood unconditionally. Thus, half-brothers are related in the same degree as brothers of the full blood, because they are all of the same father or mother. In computing the degrees, we reckon from the deceased brother to the father, and from the father to the half-brother, and as the latter is as fully related to the *father* as was the deceased, he is fully entitled to share.

3. *Mode of Distribution.*

Enquiry must now be directed to the mode of distribution, what persons are entitled to take in the direct line, and in what proportions.

The cases naturally divide themselves into three classes, according to circumstances, namely:—

(*p*) 2 Black. Comm. 205, 206.
(*q*) 2 Black. Comm. 504.
(*r*) 2 Black. Comm. 504.

First, where the only descendants are children of the intestate, and none are dead.

Secondly, where the children of the intestate are all dead, and some or all have left issue.

Thirdly, where some of the children of the intestate are living, and some are dead leaving issue.

(i) *Children only.*

First, where the only descendants are children of the intestate, and none are dead.

Posthumous children are included, both by the common law and by statute. By section 57 of the Act(*s*), "descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him." This section applies to the estates of persons dying after *The Devolution of Estates Act* came into force(*t*). But this was already the law in the distribution of personalty under *The Statute of Distribution*.

In *Wallis* v. *Hodson*(*u*), the intestate left issue, a son, who died within a week after his father, and his wife *enceinte* of the plaintiff, who was born five months after her father's death. It was claimed by the widow that the son, on his father's death, had become entitled, to the exclusion of the plaintiff; and that on his death his whole interest passed to the widow, his mother. On the other hand, it was claimed by the plaintiff, the posthumous child, that she took an equal share with her brother; and it was so held(*v*).

Again, all the children of the intestate, although some of them are related to others by the half-blood, share

(*s*) R.S.O. c. 127.

(*t*) See s. 37, *ad fin.*

(*u*) 2 Atk. 115.

(*v*) See also *Edwards* v. *Freeman*, 2 P. Wms. at p 446.

equally, for they are all of the same degree of kindred to the *intestate*(*w*).

Although the statute speaks of distributing "amongst the children," yet, where there is only one child, he is nevertheless entitled. Thus, where the intestate left a widow and one child, the widow took one-third and the child the other two-thirds; for "*distribuere* in this case is no more than *tribuere*, and must be so taken"(*x*). So, also, where there is but one child, and no widow, the child takes the whole(*y*).

Where there are more children than one, the surplusage after allotment of the widow's share, or the whole surplusage if there is no widow, is distributed "by equal portions to and amongst the children."

This is the same mode of distribution as obtained under the Inheritance Act. But (in case of distribution amongst descendants of equal degree of consanguinity to the testator) the parallel ends here. Under *The Statute of Distribution*, it is the *children's* shares which are kept in view always, and, however remote their descendants may be, they always succeed to the children's shares, and that too, whether they are in equal or unequal degree of consanguinity to the intestate. But under the Inheritance Act the rule always obtains that where descendants are all of equal degree they share equally *per capita*(*z*); but where they are of unequal degree, however near or however remote, they take *per stirpes*, the *stirpes* being those that are related in the nearest degree to the intestate(*a*).

(*w*) *Smith* v. *Tracy*, 1 Mod. 209; 2 Mod. 204; *Winchelsea* v. *Norcliffe*, 1 Vern. 437; *Crooke* v. *Watt*, 2 Vern. 124.

(*x*) *Palmer* v. *Allicock*, 3 Mod. at p. 62.

(*y*) *Davers* v. *Dewes*, 3 P. Wms. 49, note (D.).

(*z*) R.S.O. c. 127, s. 42.

(*a*) Ibid. s. 44.

(ii) *Descendants of Children Only.*

Secondly, where the children of the intestate are all dead, and some or all have left issue.

"In case any of the said children be then dead," distribution is to be made amongst "such persons as legally represent such children." Legal representatives in this statute mean, not the administrators of deceased children, but persons taking beneficially, that is, descendants (*b*). Consequently, lineal descendants to the remotest degree are entitled to take, as "representing" children(*c*). But it is strictly confined to descendants. Therefore, where the intestate's son dies leaving a widow and a child, and then the intestate dies, the widow of the son takes nothing, the child taking the whole of his father's share (*d*).

As to the proportions in which grand-children are to take, there has been some conflict of authorities, but the better opinion seems to be that they take *per stirpes*, each family taking the parent's share by representation, and not *per capita*.

In Toller on Executors, it is said that (children being dead) grandchildren take *per capita*, as next of kin, that is each an equal share in his own right(*e*). But the cases cited(*f*) do not sustain the proposition, being all cases of collaterals who take in their own right, as *next of kin*, whereas the statute speaks of the descendants of children as their *representatives*.

The opinion of Toller is quoted in Williams on Executors(*g*) with approval, and, notwithstanding two late de-

(*b*) *Bridge* v. *Abbott*, 3 Bro. C.C. at p. 226.

(*c*) *Carter* v. *Crawley*, Sir T. Raym. at p. 500.

(*d*) *Price* v. *Strange*, 6 Madd. 161.

(*e*) 7th ed. 374.

(*f*) *Walsh* v. *Walsh*, 1 Eq. Ca. Abr. 249, pl. 7; *Bowers* v. *Littlewood*, 1 P. Wms. 595; *Davers* v. *Dewes*, 3 P. Wms. 50; *Lloyd* v. *Tench*, 2 Ves. Sr. 213; *Durant* v. *Prestwood*, 1 Atk. 454; *Janson* v. *Bury*, Bunb. 157.

(*g*) 9th ed. 1367, 1368.

cisions to the contrary, is adhered to. But it is worthy of remark that in the same work at a previous page(*h*), the expression—"such as legally represent such children"—is said to be understood "of descendants and not next of kin." And for this the learned writer cites *Bridge* v. *Abbott*(*i*), where Lord Alvanley says, "There is another sense in which the words, *legal representatives,* may be understood: viz., the persons entitled beneficially to the property. It is true, in the Statute of Distributions, the words *legal representatives* are not used for next of kin, nor for executors or administrators, but for the testator's (*qu.* intestate's) children, or their children only, or *the descendants* of the next of kin; the statute means persons *substituted in the place of others deceased*"(*j*). It seems as if in the texts already quoted due attention had not been paid to the fact that grandchildren, and all other descendants of children, take as representatives, or substitutes, of children, and therefore take the children's shares—or *per stirpes.*

In Watkins on Descent(*k*) it is said that descendants of children take *per capita.* But, in a note to this text, Mr. Joshua Williams says, "The authorities here referred to do not support the position taken in the text. They are all cases of the children of deceased brothers of the intestate taking *per capita,* there being no mother, brother or sister of the intestate living at his death. But in those cases the children of the brothers take as next of kindred, and not by representation, whereas the descendants of the children of an intestate take under the description of 'such persons as legally represent such children.' It would seem, therefore, that the grandchildren ought to be entitled *per stirpes*"(*l*).

(*h*) P. 1366.

(*i*) 3 Bro. C.C. at p. 226.

(*j*) See also *Evans* v. *Charles,* 1 Anstr. 132.

(*k*) 4th ed. p. 259, citing, however, only some of the same cases as Toller.

(*l*) Mr. Joshua Williams cites Burton's Compendium for this, and may have relied on that authority only. At any rate his approval is important.

In Burn's Ecclesiastical Law(*m*), the rule of the civil law is stated to be that the succession is *per stirpes* and not *per capita*; but the text proceeds that the decisions in England would be different, the rules of the common law awarding a distribution *per capita*. It will appear, however, that the Courts have recognized the fact that the statute was intended to perpetuate the rules of the civil law which had previously obtained in the Spiritual Courts(*n*), and this authority should therefore be taken in favour of a *per stirpes* and not a *per capita* distribution.

These are the principal opinions in favour of the view that (children being dead) grandchildren take *per capita*, and some of the objections to the opinions.

We must now look at the contrary authorities. In Burton on Real Property(*o*) it is said, "It has been thought, however, that where the claimants are all in the same degree of lineal descent from the intestate (as grandchildren after the death of all his children), the distribution is not to be made on the principle of representation, but by the more simple rule of personal equality; or, as it is commonly expressed, *per capita*, and not *per stirpes*. See Toller on Executors, p. 375. But it may be doubted whether this was the intention of the statute; and the authorities (as *Davers* v. *Dewes*, 3 P. Wms. 40; *Lloyd* v. *Tench*, 2 Ves. Sr. 213, etc.) which establish that mode of distribution in the case of collaterals, under section 6, are grounded upon a reason which does not apply to the issue of the intestate (viz., that where all take as equally *next of kin*, the words of the statute afford no room for the introduction of representative claims). For there is no mention made of next of kin in

(*m*) Vol. 4, p. 544.

(*n*) *Wallis* v. *Hodson*, 2 Atk. at p. 117; *Thomas* v. *Ketteriche*, 1 Ves. Sr. 333; *Lloyd* v. *Tench*, 2 Ves, Sr. 213; *Re Ross*, L.R. 13 Eq. at p. 293; *Edwards* v. *Freeman*, 2 P. Wms. 441.

(*o*) 7th ed. 1403, n.

any part of the statute which precedes the supposition of a failure of the intestate's issue." This passage is cited with approval by Mr. Joshua Williams in his note to Watkins on Descent (*p*). These are the authorities of text writers against Toller and Williams.

In *Lockyer* v. *Vade* (*q*), however, Lord Hardwicke had had the very case before him, and after argument expressed his opinion as in favour of a division *per stirpes*, though it was not necessary to decide the point at the time, as it was not then apparent that there would be any surplus for distribution.

The matter stood in this position—Toller and Watkins on the one hand, Toller with the approval of Williams in his work on executors, but with the support only of cases on collaterals; and Burton and Joshua Williams on the other, with Lord Hardwicke's decision unnoticed—when the point arose in a qualified form before Wickens, V.C. (*r*). In that case the persons entitled to share were grandchildren and great-grandchildren, but the question was the same in principle, namely, whether the lineal descendants took in their own right, or merely as "representing" the children, and, therefore, taking the respective shares of the children. The Vice-Chancellor pointed out that the statute divides the persons entitled to distribution into two classes, viz., children, or their representatives, that is, descendants, and next of kin, or relatives who are not descendants; that the statute was intended to introduce the rules of the civil law into this branch of English law (*s*); and that the civil law required a division *per stirpes*; and he held that the fund should be divided into as many shares as there were children who left living descendants, and that

(*p*) See ante, p. 250.
(*q*) Barn. Ch. 444.
(*r*) *Re Ross*, L.R. 13 Eq. 286.
(*s*) See the cases cited ante, p. 251, note (*n*).

the descendants of each of such children took the child's share as representing him.

The question again arose in *Re Natt*(*t*) in absolute form, where three children of a deceased son, and one child of a deceased daughter were entitled. North, J., reviewed the authorities, and held that children and their descendants were not within the meaning of the expression "next of kindred," and consequently that the principle of distribution amongst next of kin did not obtain amongst the descendants of children. After examining the authorities above referred to and some others, His Lordship concluded, "There is, therefore, not merely a conflict of opinion among the text writers, but there is what I must consider the decision of Lord Hardwicke(*u*), that the division should be *per stirpes*. There is, moreover, the case of *In re Ross' Trusts*(*v*), before Vice-Chancellor Wickens. If I am right in my construction of the statute, that it gives nothing in terms to the grandchildren of the intestate, but that the provision for 'children' covers all the descendants of children, the decision in *In re Ross' Trusts* is directly in point."

For the present, the point may be said to be settled by these cases in favour of a division *per stirpes* when all the children are dead leaving descendants.

There is yet another opinion or dictum which was not cited in either of the cases just referred to. It is from a very early case(*w*), decided by Lord Chief Justice North, twelve years after the Statute of Distribution was passed, and near enough to show an exact appreciation of the reason for passing it, in which the law and practice before the statute are expounded, the reason of passing the statute given, and the

(*t*) 37 Ch. D. 517.
(*u*) *Lockyer* v. *Vade*, Barn. Ch. 444.
(*v*) L.R. 13 Eq. 286.
(*w*) *Carter* v. *Crawley*, Sir T. Raym. 496.

interpretation to some extent set out. The Lord Chief Justice states the practice and law of the Spiritual Courts before the Act to have been as follows:—"In respect of the intestate it may be thought an obligation upon every man to provide for those which descend from his loins; and as the administrator is to discharge all other debts, so this debt to nature should likewise exact a distribution to all that descend from him in the lineal degrees, be they never so remote. And because those which are remote have not so much of his blood, therefore the measure should be according to the *stocks,* more or less as they stand in relation to him. Upon this reason representatives are admitted to all degrees in the lineal descent"(*x*).

Then with regard to collaterals, he says, "There is no such obligation to the remote kindred in a collateral line, therefore they are not regarded but in respect of proximity as they are *next of kin,* it being to be supposed every man should leave his estate to his next kindred; but the children of those that are deceased come not within this reason, for they are a degree more remote"(*y*).

Finally the Lord Chief Justice says, in dealing with the Act itself, "The whole scope of the Act was to make their jurisdiction(*z*) as to distribution legal, which before was condemned by the King's Courts, and the words of the Act (legally representing) (*pro suo cuique jure*) and (according to the laws in such cases) and (the rules and limitations set down), show that there is a reference to their laws. Now if there were an opinion this way before the Act, there is

(*x*) At p. 500.

(*y*) At p. 501. This passage is quoted with approval by Blackstone, Tracts, p. 177.

(*z*) The jurisdiction of the Spiritual Courts, which administered civil law.

great reason to believe this clause was founded upon that opinion, and to expound it that way''(*a*).

There is also a very cogent argument against the theory of Toller and Williams to be found in Holdsworth & Vicker's Law of Succession(*b*). These learned writers cite *Re Ross* and *Re Natt* for the propositions there decided, and add, "It is argued (Williams, Exors. p. 1368, note c) that on the true interpretation of this clause, when all the children of the intestate are dead, their children take *per capita*, not *per stirpes*, i.e., as next of kin in their own right, and not as representing their parents. If this were so, why should grandchildren be preferred to brothers or grandfathers? All are in their own right in the second degree. Where nephews and nieces take in their own right they share with those in the same degree of kindred with themselves. This is not so in the case of descendants, as Williams allows (p. 1366). Though, he says, grandchildren take *per capita*, they take before other relatives. If we admit that they take *per stirpes*, this is intelligible. It is merely an arbitrary rule if we say that they take *per capita*." This argument seems to be unanswerable. If they are to take as next of kindred, all others in equal degree with them should share with them. If not, then it must be because they must take merely as "representing" their ancestors, the children, and therefore take their shares.

It may not be out of place to suggest another reason why this course should be adopted. The words of the stat-

(*a*) At p. 504. See also *Re Ross*, L.R. 13 Eq. at p. 293, where it is said that the Act was intended to introduce the rules of the Roman civil law into this branch of English law. In *Thomas* v. *Ketteriche*, 1 Ves. Sr. 333, it is said that as the ecclesiastical courts determined who should have administration by the rules of the civil law, and also have jurisdiction to entertain a suit for distribution, and would in that case distribute according to the same rules, the law could not be changed by going into another court. See also *Wallis* v. *Hodson*, 2 Atk. at p. 117; *Lloyd* v. *Tench*, 2 Ves. Sr. 213; *Edwards* v. *Freeman*, 2 P. Wms. 441.

(*b*) P. 141.

ute are as follows:—"All the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead, *other than such child* as shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion equal to the share which *shall by such distribution be allotted to the other children,* to whom such distribution shall be made." This is the clause commonly called the hotchpot clause. And if we find that it is operative, not only when the distribution is amongst children, but when it is amongst descendants of children, it would seem to be conclusive that the fund *must* be divided into as many shares as there were children, and that the descendants of children shall succeed to the several shares; otherwise it would not be possible to equalize the shares of the children by bringing a child's advancement into hotchpot. And it has been so held. In *Proud* v. *Turner*(*c*), a father had several children, and in his lifetime advanced in part one of them. The child so advanced died in his father's lifetime, leaving issue, and afterwards the father died; and it was held that the issue of the deceased child must bring into hotchpot what the child received in advancement, "as he, if living, must have done, in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than their father, if living, would have been, and had claimed his distributive share." It is true that the distribution appears here to have been between children and the issue of a deceased child; but the principle of making the hotchpot clause apply to the descendants of a deceased child is the important feature. If it applies when one child is dead, so it does when more are deceased than one; and

(*c*) 2 P. Wms. 560.

so must it apply when all are dead; for the statute makes no restriction. It is the child's share that is spoken of, whether children or representatives of children are mentioned; and the exception of the advanced child follows grammatically upon the naming of a class of persons, that is to say, children and representatives of children; and when in such a class there is found an advanced child, the share is to be charged with the advancement. It seems impossible to avoid this construction of the statute.

Again, the statute proceeds to indicate how distribution shall be made in that case, and concludes, "as shall make the estate of all the said *children* to be equal as near as can be estimated." It is always the share of the child which is dealt with in speaking of distribution amongst legal representatives of children, as well as amongst children. It seems impossible to apply the hotchpot clause unless the shares of children are kept distinct, as the several entities to which their descendants are to succeed, in order that advancement may be charged against the share of the advanced child.

This mode of distribution differs entirely from the mode of succession under the Inheritance Act. *The Statute of Distribution* makes the *children* of the intestate *stirpes* or stocks from whom their descendants take the children's proportionate shares; and that is the case, whether the descendants of children are in equal or unequal degree of consanguinity to the intestate. But under the Inheritance Act the rule was universal that where the descendants entitled were in equal degree of consanguinity to the intestate they shared equally, however remote(*d*); but where they were of unequal degree, those of them in the nearest degree formed the *stirpes* or stocks, and the estate was divided accordingly, the more remote descendants taking the shares

(*d*) R.S.O. c. 127, s. 42.

that their *stirpes* or stocks would have taken had they survived.

Thus, in *Re Ross*(*e*), the distribution was under *The Statute of Distribution*, and was amongst grandchildren and great-grandchildren. The estate was divided into as many shares as there had been *children* who left descendants living, and these shares were divided amongst the descendants of the children according to families.

If the same state of circumstances had occurred under the Inheritance Act, the land would have been divided into as many shares as there were *grandchildren* living, and deceased grandchildren who left descendants living; and each grandchild would have taken one share, and each family of great-grandchildren would have taken the share of the deceased grandchild from whom they were descended.

(iii) *Children and Descendants of Children.*

Thirdly, where some of the children of the intestate are living, and some are dead leaving issue.

No question arises upon this state of facts; for the words of the statute are plain and unmistakable, that there shall be distributed "all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead." The estate is divided into as many portions as there are living children and deceased children who have left issue. Each living child takes a share; and the descendants of each deceased child take the share which their ancestor, the child, would have taken if he had survived. This is the same mode of succession as obtained under the Inheritance Act, where there were children and grandchildren entitled(*f*).

(*e*) L.R. 13 Eq. 286.
(*f*) R.S.O. c. 127, s. 43.

But when the descendants are in unequal degree of consanguinity and more remote, a different rule now prevails, as we have already seen. Thus, if the distribution is to be made between grandchildren and great-grandchildren, the *children's* shares are still kept in view as fixing the proportions in which distribution is to be made. The original and primary provision in the statute is for *children*; and their descendants only stand in their places as substitutes. Therefore, each child is (as to the share he would have taken had he survived) taken as a stock of descent, and his share is taken as descending to and amongst his descendants to the most remote degree(*g*).

But where the same state of facts arose under the Inheritance Act, as we have seen, those nearest in degree to the intestate formed the stocks or *stirpes*, and the land was divided accordingly.

(*g*) *Re Ross*, L.R. 13 Eq. 286.

CHAPTER XX.

Advancement and Hotchpot.

1. *What Statute is in Force.*
2. *Differences Between Statute of Distribution and Inheritance Act.*
3. *Conditions for Hotchpot—Legal Intestacy.*
4. *Hotchpot Benefits Children Only.*
5. *What Constitutes Advancement.*
6. *Advancement Under Inheritance Act.*

In dealing with the distribution amongst children and their descendants, it has been assumed that no child had been advanced. It must always be a fact to be ascertained, however, whether any child has been advanced. For a child advanced has *no title* to share in the distribution at all, if his advancement is equal to or greater than the shares of his brothers and sisters in the distribution; nor, if his advancement has been less than his brothers' and sisters' shares, has he any title to share in the distribution, except to an amount sufficient with the amount of his advancement to make his whole acquisition equal to the shares of those who have not been advanced.

1. *What Statute is in Force.*

There are two statutes bearing on this matter, and it is a question which of them is to govern.

When *The Devolution of Estates Act* was first passed, declaring that land should be distributed as personalty, it superseded the Inheritance Act in all respects, as far as the estates affected were concerned. Hence the *Statute of Dis-*

tribution became the law as to realty, and the hotchpot clause with it. This would have been sufficient and satisfactory, for the law was well established and certain. No change in this respect was made when the Statutes were revised in 1887. In fact, it was expressly declared that the advancement clauses of the Inheritance Act (amongst others) should not apply to the estates of persons dying on and after 1st July, 1886(*h*). And *The Statute of Distribution* remained as the sole Act respecting distribution of land until 1897, when the revisers made a change, and declared that the advancement clauses of the Inheritance Act (amongst others) *should* apply to the estates of persons dying on and after 1st July, 1886(*i*).

This probably superseded the *Statute of Distribution*, or impliedly repealed it as a special law with respect to advancement and hotchpot, though in other respects *The Statute of Distribution* still governed.

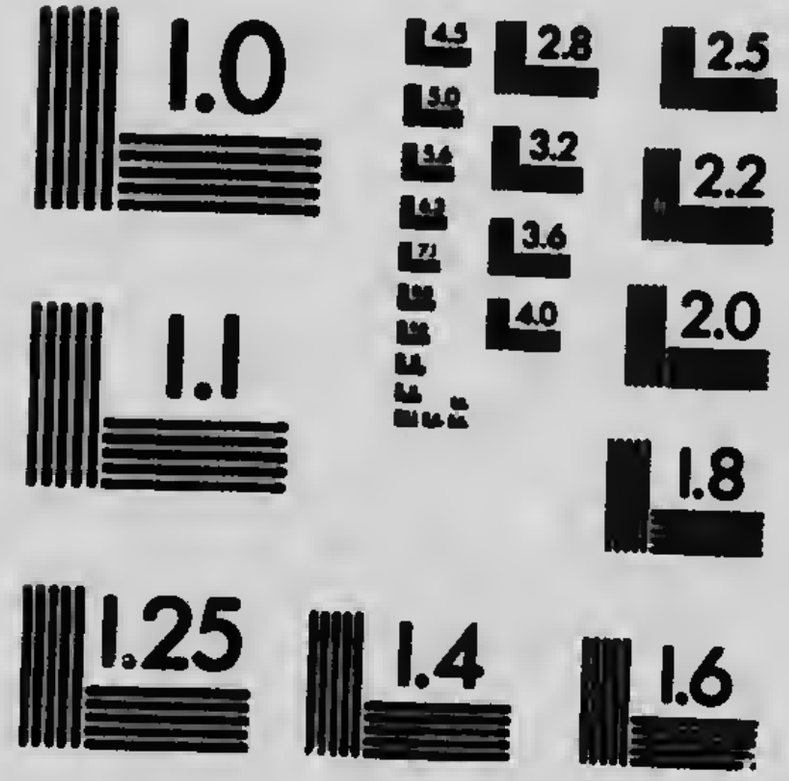
This would also have been sufficient and satisfactory.

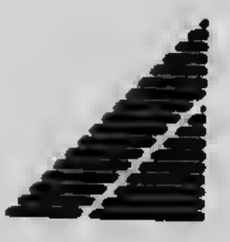
But when the Imperial Statutes were revised and certain of them introduced into our revised statutes, the revisers revived the advancement clauses of *The Statute of Distribution*, by placing that statute intact in the statute book.

Though these statutes are not to be treated as new laws, but as declaratory of the law as contained in them(*j*), it can hardly have been intended that the advancement clauses, which were impliedly repealed by the advancement clauses of our own statute, should be printed merely, without being effective. Presumably the intention was to make them effective, as well as the other portions of the Act.

After thus oscillating between the advancement clauses of *The Statute of Distribution* and those of the Inheritance

(*h*) R.S.O. (1887) c. 108, s. 27.
(*i*) R.S.O. (1897) c. 127, s. 37, *ad fin.*
(*j*) 2 Edw. VII. c. 13.





Act, from 1886 down to 1902, we now have both enactments on the statute book. Either they are both effective and they have to be worked together, or *The Statute of Distribution* impliedly repeals the Inheritance Act—a point which must be left for judicial determination. It appears, however, that the revisers must have thought that *The Statute of Distribution* was, or was to be, the only, or governing, statute, for in another revised Act it is enacted that where an executor holds an undisposed of residue, he is to hold it in trust for the persons entitled under *The Statute of Distribution*(*k*).

2. *Differences between Statute of Distribution and Inheritance Act.*

Fortunately, the provisions of the two enactments do not differ in essential points; but the conditions necessary for the application of each are different, and it seems impossible to reconcile them. The chief points of difference are as follows:—

The Statute of Distribution, in this respect, applies only to the estates of *fathers* dying intestate, and not mothers. By the *Statute of Frauds*(*l*) it was especially provided that *The Statute of Distribution* should not apply to the estates of *feme coverts* that die intestate, but that husbands should have all their antecedent rights. Although it was so specially enacted yet it has also been determined, on the interpretation of the Act itself, that it is in this respect confined to the estates of *fathers*, inasmuch as provision is made for distribution amongst the *wife* and children. And Lord Chancellor King said, "The Act seems to include those within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only"(*m*);

(*k*) See R.S.O. c. 337, s. 14.

(*l*) 29 Car. II. c. 3, s. 25.

(*m*) *Holt* v. *Frederick*, 2 P. Wms. 356; and see *Bennet* v. *Bennet*, 10 Ch. D. at p. 478; and *Re Lambert*, 39 Ch. D. 626.

and so, a child advanced by his mother need not bring his advancement into hotchpot. Indeed, there is no such thing as advancement by a mother under *The Statute of Distribution.* Although the section of the Statute of Frauds, which has been cited, is not in force in this Province, yet the interpretation of *The Statute of Distribution,* as set out by Lord Chancellor King, remains, and is undoubtedly the proper interpretation of the enactment. Thus, the advancement and hotchpot clauses of *The Statute of Distribution* apply only to the estates of fathers.

There is no such restriction in the Inheritance Act. Its wording is not restrictive, but, on the contrary, is comprehensive. It is possible, therefore, for a mother to advance her child by agreement under this Act, for it relates to all parents.

Again, by the terms of the Inheritance Act, in order to constitute an advancement, the settlement or gift must be evidenced in writing made by the parent, or so acknowledged by the child. The words of the enactment are as follows:—"If any child of an intestate has been advanced by the intestate by settlement, or portion of real or personal estate, or both of them, *and the same has been so expressed by the intestate in writing,* or *so acknowledged in writing by the child,* the value thereof shall be reckoned . . and if such advancement is equal to or superior to the amount of the share . . then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate"(*n*). This provision was inserted probably for the purpose of avoiding questions as to what constituted an advancement (*o*).

No such condition as this is imposed by *The Statute of Distribution.* But it is always left open to enquiry, as a

(*n*) R.S.O. c. 127, s. 60.
(*o*) *Filman* v. *Filman,* 15 Gr. 643.

matter of fact, whether a provision has been made for a child and whether it constitutes an advancement.

A third instance, in which there is a difference, is that whereas *The Statute of Distribution,* in its terms, excludes the child from sharing in the personal estate, the Inheritance Act excludes him from sharing in both realty and personalty. It is a debatable point, however, whether there is any difference in this respect. Taking the bare words of the Statute of Distribution, the consequence of a child's advancement is that he is merely to be excluded from sharing in personalty. In England, this meant, in all cases except the case of the heir, complete exclusion from the estate; for the children other than the heir took no land by descent except in the case of coparceners. The words of the Act, when applied to this Province, mean merely that, although all the children may get land as well as personalty, if they are advanced they will get no personalty. On the other hand, it may be that, as the rules as to distribution of personalty are to govern the distribution of land in all respects, if a child is advanced he must be excluded from a share in the realty as well as in the personalty; because the rule now is to be the same in each case. Even if the latter be the true interpretation, it does not advance the matter very much; because there are still remaining the two other great differences between the two enactments, which seem impossible of reconcilement.

If the only difference were that *The Statute of Distribution* applies to fathers, as respects advancement, and the Inheritance Act is general, it would be possible to hold that the latter applied to mothers and the former to fathers. But there would be no warrant for confining the Inheritance Act to mothers—it would merely be a crude way of escaping from a difficulty. And it seems impossible to reconcile the conditions as to writing of the Inheritance Act with the freedom therefrom of *The Statute of Distribu-*

tion. The solution of the difficulty must be left to the Courts, or to another effort of the Legislature. The only escape from the dilemma seems to be to hold that the re-enactment of *The Statute of Distribution*, together with the reference thereto in the concurrent Act(*p*), as to executors holding an undisposed of residue in trust for the persons entitled under *The Statute of Distribution*, has again impliedly repealed the Inheritance Act as to advancement.

3. *Condition for Hotchpot—Legal Intestacy.*

In the meantime, it may be well to ascertain under what circumstances an advanced child must bring his share into hotchpot in order to share in the distribution; what constitutes an advancement under *The Statute of Distribution*; and how the distribution proceeds upon the share being brought in.

In order that a child might be obliged to bring his advancement into hotchpot, it was said at one time that there must have been an actual intestacy; that where there was an executor, and therefore a complete will, and the executor was declared a trustee for the next of kin, the latter took, not by intestacy, but by the will, as if the residue had actually been given to them (*q*). And this is the principle accepted in Williams on Executors (*r*) notwithstanding a case there cited of *Stewart* v. *Stewart*(*s*), where Sir Geo. Jessel, M.R., held the contrary.

But in recent decisions the older authorities have been exhaustively reviewed, and it has been pointed out that in these there was a failure only of a *part* of the testamentary disposition; and that, therefore, they were no authority

(*p*) R.S.O. c. 337, s. 14.

(*q*) *Walton* v. *Walton*, 14 Ves. at p. 324; *Wilkinson* v. *Atkinson*, T. & R. 255.

(*r*) 9th ed. p. 1370.

(*s*) 15 Ch. D. 539.

for the proposition that where the will fails altogether (as through the death of a universal legatee), leaving an executor, there is not an intestacy. On the contrary, it is thought that an equitable intestacy, or an intestacy as to beneficiaries, the executor being the legal owner and taking under the will, is sufficient to make the statute apply. It has also been said that, even where equity holds the executor a trustee, it is not for the next of kin, using that expression in its ordinary sense of nearest of kindred, but for "those entitled under *The Statute of Distribution,*" which would include the wife, and would exclude advanced children. For it is to be borne in mind that distribution takes place only amongst children "*other than* such child" as shall have been advanced. So that an advanced child has no title to share in the distribution, or a title only to such amount as will equalize his total acquisition with his brothers' and sisters' share; and is therefore not a person entitled under the statute.

And so, in *Stewart* v. *Stewart*(*t*), where a gift to a child was revoked and no further disposition was made of it, Sir Geo. Jessel, M.R., held that the executors held it in trust for the children of the testator, and applied a hotchpot clause in the will to the undisposed of interest. But he went further and held that the executors held in trust, not for the nearest relatives or legatees, but for the persons entitled under the statute, in the shares mentioned in the statute, and therefore on the conditions therein mentioned, which would make applicable the hotchpot clause of the statute.

In an Irish case (*u*) there was a complete failure of the will by reason of the death of a universal legatee before the testator, and after a review of the old authorities it was

(*t*) 15 Ch. D. 539.
(*u*) *Harte* v. *Meredith*, 13 L.R. Ir. 341 (1884).

held that whatever might be their value as precedents, they did not apply to the case before the Court, because there had been partial failures only. And it was further held that though administration with the will annexed was granted, there was a complete intestacy, and that the administrator held in trust for those entitled under *The Statute of Distribution*, and that the hotchpot clause of that statute applied.

A similar result was arrived at in an English case (*v*), where an exactly similar state of facts occurred.

In both of these cases this result was attained without reference to an Act presently to be mentioned, but in both it was pointed out that this statute would now govern, and as it is now in force in this Province it must be taken as settled that whenever there is an undisposed of residue which the executors hold for the descendants of the deceased, the hotchpot clause of *The Statute of Distribution* applies, if the facts call for it. The enactment is as follows:—"When any person shall die having by will, or codicil, appointed any person to be executor, such executor shall be deemed to be a trustee for the person (if any) who would be entitled to the estate under *The Statute of Distribution*, in respect of any residue not expressly disposed of, unless it shall appear by the will, or codicil, that the person so appointed executor was intended to take such residue beneficially" (*w*).

As has been already pointed out an advanced child is excluded from the distribution if his advancement is equal to or greater than the shares of his brothers and sisters, and therefore he is not a person "entitled to the estate under the statute." And if the amount of his advancement is less than such shares, then he is excluded to that extent

(*v*) *Re Ford*, L.R. (1902), 1 Ch. 218; affirmed (1902) 2 Ch. 605.
(*w*) R.S.O. c. 337, s. 14.

and has no title to share except to an amount sufficient to equalize his whole acquisition with the shares of his brothers and sisters.

A provision made by will is not within the rule as to hotchpot, for the Act contemplates an intestacy and not a testacy (*x*). In order to be subject to the rule the provision must be made by an act complete in the intestate's lifetime (*y*), although the benefit may not actually accrue to the child until after the father's death, as where the father covenants with trustees that his child shall have a sum of money within a certain time after his death (*z*).

4. *Hotchpot Benefits Children Only.*

Where there is an advancement, it is not to be brought into hotchpot for the benefit of the widow, who is to get no advantage from it (*a*); the children only are to be benefited by it, for the object of the statute is to provide for equality amongst the children.

The statute takes nothing away that has been given to a child, nor does it break into any settlement made by a father; it simply deals with what is left undisposed of by the father, and excludes from sharing therein any child who has been advanced, no matter how much his provision exceeds the share he would have taken; or, if it is less than the share of the others, it excludes him to that extent; but if the child advanced is not content, he must bring into hotchpot what he has received, in order that there may be equality amongst all the children (*b*).

(*x*) *Twisden* v. *Twisden*, 9 Ves. at p. 425.
(*y*) *Edwards* v. *Freeman*, 2 P. Wms. at pp. 440, 446.
(*z*) Ibid. at pp. 442, 445.
(*a*) *Kirkcudbright* v. *Kirkcudbright*, 8 Ves. at p. 64.
(*b*) *Edwards* v. *Freeman*, 2 P. Wms. at p. 443.

5. *What Constitutes Advancement.*

As to what constitutes an advancement, the principal idea is that it is a provision made for a child to establish him in life (*c*). "In short, whenever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance" (*d*). And so it may appear as a settlement (*e*) either voluntary or upon consideration of the child's marriage (*f*), a contingent provision when the contingency has happened, land, a charge upon land, rent, money, stocks in companies, a reversion (*g*), a sum paid for a commission in the army (*h*), an annuity secured by bond (*i*), a premium paid to an attorney on the son's being articled, and afterwards a sum paid for a commission in the army on abandonment of the profession of the law (*j*), a sum paid for admission to one of the Inns of Court for a son intended for the Bar, and afterwards a sum paid for a commission, the son having abandoned the profession of the law, and his outfit for the army (*k*), a sum paid for the good-will of a business and stock in trade (*l*).

(*c*) *Taylor* v. *Taylor*, L.R. 20 Eq. at p. 157.

(*d*) *Boyd* v. *Boyd*, L.R. 4 Eq. at p. 308.

(*e*) Where land is settled the whole value of it is to be brought into hotchpot and not only the child's life estate under the settlement. *Weyland* v. *Weyland*, 2 Atk. at p. 635.

(*f*) *Phiney* v. *Phiney*, 2 Vern. 638; *Edwards* v. *Freeman*, 2 P. Wms. at p. 446.

(*g*) *Edwards* v. *Freeman*, 2 P. Wms. at pp. 440, 441, 442.

(*h*) *Kirkcudbright* v. *Kirkcudbright*, 8 Ves. 51; 3 P. Wms. 317, note (O.).

(*i*) Ibid; *Hatfield* v. *Minet*, 8 Ch. D. 136.

(*j*) *Boyd* v. *Boyd*, L.R. 4 Eq. 305.

(*k*) *Taylor* v. *Taylor*, L.R. 20 Eq. 155.

(*l*) Ibid. at p. 158. And see *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254, where a father lent a sum of money to his son to engage in business and took his promissory note, which he destroyed when on his death-bed; and it was held that the debt was released, but that the son should bring the money advanced into hotchpot.

Payment of a son's debts has been held to be an advancement (*m*).

On the other hand, money expended in repairing houses which, it was alleged, a father had given to his eldest son though no conveyance had been executed, and which ultimately descended to the eldest son, was held not to be an advancement; though, if the gift of the houses had been perfected in the father's lifetime, it would have been so regarded (*n*).

And, as a father is bound to maintain his children, annual allowances, though annuities, are not to be brought into hotchpot (*o*). Therefore, where in a separation deed, the husband made provision for annual sums to be paid to the children, it was held that they were to be taken as in satisfaction of his obligation to maintain them, and payments made during his lifetime were not to be brought in, but at the father's death intestate the annuities were directed to be valued and the amounts so arrived at to be brought in (*p*).

Small sums of money given from time to time are not advancements (*q*), nor a gold watch, furniture, wedding clothes, especially where the father did not approve of the marriage (*r*).

And as a father is bound also to educate his children, sums paid for that purpose are not an advancement (*s*).

(*m*) *Boyd* v. *Boyd*, L.R. 4 Eq. 305; *Re Blockley*, 29 Ch. D. 250. Contra, *Taylor* v. *Taylor*, L.R. 20 Eq. 155.

(*n*) *Smith* v. *Smith*, 5 Ves. 721.

(*o*) *Hatfield* v. *Minet*, 8 Ch. D. at p. 144.

(*p*) Ibid. See and distinguish *Kirkcudbright* v. *Kirkcudbright*, 8 Ves. at p. 63.

(*q*) *Morris* v. *Burroughs*, 1 Atk. at p. 403; *Taylor* v. *Taylor*, L.R. 20 Eq. at p 158.

(*r*) *Elliot* v. *Collier*, 1 Ves. Sr. at p. 17; S.C. 3 Atk. at p. 527.

(*s*) *Taylor* v. *Taylor*, L.R. 20 Eq. at p. 155.

6. *Advancement under Inheritance Act.*

As to what constitutes an advancement under the Inheritance Act, it appears that no question can well arise, for the intention must be expressed in writing by the parent, or be so acknowledged in writing by the child. Wherever this does not occur the advance is a gift (*t*).

There being no alteration of the law as to advancement, except in the provision that it must be evidenced by writing, the law will presumably be the same under this statute as under *The Statute of Distribution*, but will apply to the estates of mothers as well as those of fathers. And so a provision made by will will not be an advancement. There need not be a complete or actual intestacy, but wherever an executor holds an undisposed of residue in trust for the persons entitled under *The Statute of Distribution* the hotchpot clause as we have seen will apply if the facts call for it.

Here, again, must be noticed another peculiarity of our legislation, already referred to. The last mentioned enactment(*u*) declares that the residue shall be held for the persons entitled under "*The Statute of Distribution*," which is the English statute(*v*), and therefore the hotchpot clause in that statute must apply, although by *The Devolution of Estates Act*(*w*), the hotchpot clauses of the Provincial Act are made specially to apply to the estates of persons who have died since the latter Act was passed. The result may possibly be that where there is an *actual* intestacy the Provincial Act will apply as to advancement, and the advancement must be evidenced by writing; while on a legal intes-

(*t*) See *Filman* v. *Filman*, 15 Gr. 643.

(*u*) R.S.O. c. 337, s. 14.

(*v*) Now R.S.O. c. 335, and having the above appellation given to it by its first section.

(*w*) R.S.O. c. 127, s. 37.

tacy, by failure of a will, the advancement clauses of *The Statute of Distribution* will apply.

Or it may be held, as has been already suggested, that *The Statute of Distribution* has again impliedly repealed the advancement clauses of the Inheritance Act.

An advancement under the Provincial Act will not be brought in for the benefit of a widow, or a father, the object being the same as in *The Statute of Distribution*, viz., "To make all the shares of the *children* in such real and personal estate and advancement to be equal, as nearly as can be estimated" (*x*).

As in the case of *The Statute of Distribution*, so under the Provincial statute, nothing is taken away from the child who has been advanced, but if his advancement is "equal or superior to the amount of the share" of the child, he is excluded from sharing in the distribution of realty and personalty (*y*); and if his advancement is less than the share he is entitled to receive enough to equalize his share with the others.

So also maintenance and education, and the giving of money, without a view to a portion or settlement, are not to be deemed an advancement under the Act (*z*).

(*x*) R.S.O. c. 127, s. 61.
(*y*) S. 60.
(*z*) S. 63.

CHAPTER XXI.

Next of Kin.

1. *Posthumous Relatives and Half-Blood.*
2. *Father and Brothers.*
3. *Brothers and Grandparents.*
4. *Grandparents and Uncles.*
5. *Grandparents.*
6. *Uncles and Nephews.*
7. *Mother and Brothers or Nephews.*
8. *Representation Among Next of Kin.*
9. *Mode of Sharing.*

Where children and their descendants fail, the statute prescribes the next of kin as the persons to take. If there is a widow she takes the whole estate, as we have seen, if it does not exceed $1,000. But where it does exceed that sum, she takes a preferential payment of $1,000, and the residue is distributed as if it were the whole estate of the intestate. She then takes an additional share under *The Statute of Distribution* if she elects to abandon dower. And, subject to this, the rights of the next of kin will be considered.

The provision for next of kin made by the statute is as follows:—"In case there be no children, nor any legal representatives of them, then one moiety of the said estate shall be allotted to the wife of the intestate, and the residue of the said estate shall be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them" (*a*). "Provided that there be no representations admitted among collaterals

(*a*) R.S.O. c. 335, s. 2, *ad fin.*

after brothers' and sisters' children, and in case there be no wife, then, all the said estate shall be distributed equally to and amongst the children, and in case there be no child, then, to the next of kindred in equal degree of, or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever" (*b*).

1. *Posthumous Relatives and Half-Blood.*

Children *en ventre sa mere* at the time of the intestate's death who, if they had been born at that time would have taken as next of kin, are entitled to share. It has already been pointed out that by the Inheritance Act, "descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him" (*c*).

So also the half-blood take equally with the whole blood, though at one time it was held that the half-blood should have but half a share (*d*). And so where a man died leaving brothers of the whole blood and sisters of the half-blood, it was held that the half-blood took equal shares with the whole blood, for they are in the same degree to the intestate as his brothers of the whole blood, there being one degree to the father of all of them in each case, and then one degree to the intestate (*e*).

The next of kin are to be ascertained by the rules of the civil law (*f*), as has been already pointed out (*g*).

(*b*) Ibid. s. 3.

(*c*) R.S.O. c. 127, s. 57. By section 37 of this Act this clause applies to persons dying after the passing of *The Devolution of Estates Act.*

(*d*) *Winchelsea* v. *Norcliffe*, 1 Vern. 403.

(*e*) *Smith* v. *Tracy*, 1 Mod. 209; 2 Mod. 204; *Crooke* v. *Watt*, 2 Vern. 124.

(*f*) *Lloyd* v. *Tench*, 2 Ves. Sr. 214.

(*g*) Ante, p. 245.

2. *Father and Brothers.*

The father of the intestate, being related to him in the first degree, formerly took the whole estate to the exclusion of all others (*h*), or shared it with the wife of the intestate, if he left one (*i*). But by *The Devolution of Estates Act*, it is enacted that "When a person shall die without leaving issue, and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving" (*j*).

In *Re Colquhoun* (*k*) this clause was construed to mean that the father took equally with the mother and sister of the intestate to the exclusion of his nieces. But this case was overruled by the Court of Appeal in *Walker* v. *Allen* (*l*) where upon an exactly similar state of facts nephews were included with the father and brothers and sisters of the intestate. In both of these cases the question at issue was not as to the right of the father, but as to the right of the children of a deceased brother. *Walker* v. *Allen* must therefore be read in that light. And when it is said that the decision in *Re Colquhoun* was wrong in declaring that the design of the clause was "that the mother, brother or sister surviving shall share equally with the father," that expression of opinion must be taken in the qualified sense (qualified by the facts) that it was wrong in excluding the nephews and nieces. It is true that the father is not declared to have an equal share, but is declared to have no greater share than the mother, brother or sister surviving. But he must at least have an equal share with mother, brother or sister if he is to have anything. That is to say,

(*h*) *Blackborough* v. *Davis*, 1 P. Wms. 51.
(*i*) *Keilway* v. *Keilway*, 2 P. Wms. 344.
(*j*) S. 6.
(*k*) 26 Ont. R. 104.
(*l*) 24 App. R. 336.

that whereas before the statute the father would have taken all, he is, since the statute, to have no greater share than the mother, brother or sister would have taken if they had been the only survivors. As they would in that case take equally, so the father, when he survives with them, takes no greater share than they, which must mean an equal share with them. Otherwise they would all take nothing.

3. *Brothers and Grandparents.*

Brothers and sisters are related to the intestate in the second degree, and so are grandparents. But, if the intestate left grandparents and brothers and sisters, the grandparents were excluded, the reason apparently being that that was the settled rule of the Ecclesiastical Courts before *The Statute of Distribution*, and that the statute was intended to confirm it (*m*). And now, by *The Devolution of Estates Act*, it is enacted as follows:—"Nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister" (*n*).

The inclusion of the father in this enactment arises out of his being put in the class with brothers and sisters by the former part of the section. There can be no other reason, for a grandfather never could before this enactment have competed with a father, being one degree more remote.

4. *Grandparents and Uncles.*

Where the intestate leaves grandparents and uncles or aunts, the grandparents, who are related in the second degree, take in preference to the uncles or aunts, who are related in the third degree (*o*). But great grandparents would share equally with uncles and aunts (*p*).

(*m*) *Evelyn* v. *Evelyn*, 3 Atk. 762.
(*n*) S. 6, *ad fin.*
(*o*) *Blackborough* v. *Davis*, 1 P. Wms. 41.
(*p*) *Lloyd* v. *Tench*, 2 Ves. Sr. at p. 215.

5. *Grandparents.*

Where the intestate leaves his grandfather on his father's side, and his grandmother on his mother's side, they take equally, being in equal degree related to him (*q*).

6. *Uncles and Nephews.*

Aunts and nieces, uncles and nephews, are all related to the intestate in the same degree, and share equally *per capita* in their own right (*r*).

7. *Mother and Brothers or Nephews.*

Before the statute of 1 Jac. 2, c. 17(*s*), if the intestate left no wife, child or father, his mother was entitled to the whole estate. But by the statute just referred to it is enacted that, "If after the death of a father any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, anything in section 2 of this Act to the contrary notwithstanding." Although this clause expressly says "without wife or children," it has been held that where a wife was left, but no children, the wife took her moiety and the mother and brothers and sisters of the intestate and his two nieces took the other moiety in equal shares. The statute was said to mean that in every case where the mother would before the statute have taken the whole, the brothers and sisters of the deceased should now share with her, and where before the statute the mother would have been entitled to the half, the brothers and sisters of the intestate should now share that half with the mother (*t*).

(*q*) *Blackborough* v. *Davis*, 1 P. Wms. at p. 53.

(*r*) *Lloyd* v. *Tench*, 2 Ves. Sr. at p. 215; *Durant* v. *Prestwood*, 1 Atk. 454.

(*s*) Now R.S.O. c. 335, s. 5.

(*t*) *Keilway* v. *Keilway*, 2 P. Wms. 344.

So also the clause in question postulates the existence of brothers or sisters, by using the phrase "Every brother and sister and the representatives of them." But in *Stanley* v. *Stanley* (*u*), where the intestate left a wife, mother and several nephews and nieces, it was held that though there was no brother or sister living, the mother must share with the nephews and nieces. One-half was given to the wife, one-quarter to the mother, and the remaining quarter to the nephews and nieces to be divided equally amongst them.

This clause is to be construed as part of *The Statute of Distribution*, and consequently representation is not allowed beyond brothers' and sisters' children (*v*).

The half-blood are included in this clause. Consequently, a mother shares with the half-brothers and half-sisters of her intestate child (*w*).

8. *Representation Among Next of Kin.*

The next of kin take in their own right as persons designated by the statute, *per capita*. And so, if an intestate leaves a deceased brother's only son and ten children of a deceased sister or half-sister, the ten children of the deceased sister or half-sister take ten parts out of eleven, and the son of the deceased brother one part(*x*). Legal representatives, *i.e.*, descendants of next of kin, are not permitted amongst collaterals to take the shares of their parents, unless they are brothers' or sisters' children. So, where an intestate left two nephews and a niece, and children of a nephew who died before him, the deceased nephew's children were excluded(*y*).

(*u*) 1 Atk. 455.
(*v*) Ibid.
(*w*) *Jessopp* v. *Watson*, 1 M. & K. 665.
(*x*) *Bowers* v. *Littlewood*, 1 P. Wms. 594.
(*y*) *Crowther* v. *Cawthra*, 1 Ont. R. 128, and cases there cited.

9. *Mode of Sharing.*

Where all those entitled to share are in equal degree of consanguinity to the intestate they take *per capita* in their own right. But where some take by representation, as in the case of children of deceased brothers and sisters, and others in their own right, as brothers and sisters, the children of the deceased brothers and sisters take *per stirpes, i.e.*, the share which their parents would have taken. Thus, all brothers and sisters take *per capita.* All children of deceased brothers and sisters (there being no brothers and sisters surviving) take *per capita,* because they are next of kin and take in their own right. But where there are brothers and children of a deceased brother, the brothers are next of kin, and take in their own right, and the children of the deceased brother take as his representatives (*z*).

(*z*) See *Lloyd* v. *Tench,* 2 Ves. Sr. at p. 215.

CHAPTER XXII.

Powers Under The Trustee Act.

1. *Statutory Powers of Sale, etc.*
2. *When the Powers are Raised.*
3. *Charge of Debts.*
4. *No Provision for Raising Money.*
5. *Estate Devised for Testator's Whole Interest.*
6. *Estate Not Devised for Testator's Whole Interest.*
7. *Devise Subject to Charge.*
8. *Testamentary Power, No One to Exercise It.*
9. *Power to Executor, Administrator Cum Test. May Exercise.*
10. *Conclusion.*
11. *Time for Exercising Powers.*
12. *Conveyance in Pursuance of Contract.*

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1. *Statutory Powers of Sale, etc.*

When land devolves upon executors under *The Devolution of Estates Act*, they are invested with the fee simple for the time being, and hold the land in right of property. When they convey during this period, they do not exercise a statutory power, but actually convey the estate of the deceased owner which is vested in them (*a*).

As long as the property in the land remained in them until conveyance, there was no need to resort to any statutory power, as such. But since the amendments which have been made to the original Act under which the land shifts into the beneficiaries, it becomes of importance to observe that the powers given to executors and administrators with

(*a*) *Allen* v. *Rever*, 4 O.L.R. at p. 312.

the will annexed by *The Trustee Act* may still be exercised although the right of property may have passed from them to the beneficiaries (*b*).

These statutory powers are for the purpose of enabling executors and others to raise money to pay debts, legacies or other sums charged on lands, where no specific power is given by the will, or no devise is made for the purpose. By s. 16 of *The Trustee Act* (*c*) it is provided that where by any will coming into operation after 18th September, 1865, "a testator charges his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and does not make any express provision for the raising of such debts, legacy or sum of money out of such estate, the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or sum of money as aforesaid by a sale and absolute disposition, by public auction, or private contract, of the said real estate or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other" (*d*). This clause applies only to devisees in trust and not to executors (*e*), and if the executors are also devisees in trust, it is in the latter and not the former capacity that they act when selling for the purpose of paying the charge. But by s. 18, when such a charge is made, and the testator does *not* devise the land to trustees for his whole interest therein, the executor or executors for the time being (if any) have the powers which devisees in trust would have had if the land had been

(*b*) See 2 Edw. VII. c. 17, ss. 1 and 2. Even without this enactment the powers could no doubt have been exercised. See ante. p. 113.

(*c*) R.S.O. c. 129.

(*d*) Taken from 22 & 23 V. c. 35, s. 14 (Imp.).

(*e*) See Farwell on Powers, 2nd ed. 87.

devised to them; and such powers devolve upon the person or persons in whom the executorship for the time being is vested (*f*). The conditions for raising the power are the same in each case, but the persons to exercise the power under the different circumstances are different.

2. *When the Powers are Raised.*

The conditions necessary for the application of these sections are as follows:—

(a) There must be a charge of the real estate, or some specific portion thereof, with payment of debts, a legacy, or some specific sum of money.

(b) There must be no express provision in the will for the raising of the debts, legacy or sum of money, out of the estate.

(c) If the estate, so charged, be devised to trustees for the whole estate or interest of the testator therein, such trustees are given a power to sell or mortgage.

(d) If the land, so charged, is not devised so as to vest the whole estate or interest of the testator in trustees, then the executor for the time being may exercise the power.

(e) These provisions do not apply where there is a beneficial devise of the land charged specifically with payment.

3. *Charge of Debts.*

The first enquiry must therefore be, What is a charge of debts?

(a) A mere authority to pay debts does not constitute a direction to pay so as to charge the realty. Therefore, where a testator gave power to his executors "to adjust and pay all claims made upon my estate," it was held that the executors had no right to sell realty (*g*).

(*f*) Taken from 22 & 23 V. c. 35, s. 16 (Imp.).
(*g*) *Re Head's Trustees & Macdonald*, 45 Ch. D. 310.

There must be a direction, not a mere authority, to pay. Thus the words, "I will and direct that my just debts, funeral and testamentary expenses be paid and satisfied" are held to constitute a charge on lands(*h*); and similar directions varying in form, but not in substance, have the like effect (*i*).

Such expressions as "My debts being *first satisfied*, I devise, etc."(*j*); "*After payment* of all my just debts, etc., I give, etc."(*k*); indicate very clearly that the devise is not to be effectual until debts are paid, which is a clear charge of debts on the subject matter of the devise. But such expressions are not necessary in order to constitute a charge, nor does the theory depend upon the use of such expressions as "in the first place," etc.(*l*).

There is a distinction between a general direction, by which an implied authority arises in the executors to pay debts out of realty, and an *express* direction *to the executors* to pay them, by which no such charge arises(*ll*).

"The authorities further determine, that where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by the will, which is the case here. But

(*h*) *Clifford* v. *Lewis*, 6 Madd. 33.

(*i*) *Shaw* v. *Borrer*, 1 Keen 559; *Ball* v. *Harris*, 8 Sim. 485; 4 M. & Cr. 264; *Harding* v. *Grady*, 1 Dr. & War. 430; *Corser* v. *Cartwright*, L.R. 7 H.L. at p. 735.

(*j*) *Harris* v. *Ingledew*, 3 P. Wms. 91.

(*k*) *Shallcross* v. *Finden*, 3 Ves. 738.

(*l*) *Clifford* v. *Lewis*, 6 Madd. at p. 38.

(*ll*) The summing up of Mr. Joshua Williams upon the authorities which established this doctrine, is worth reproducing: "A testator, by merely directing his debts to be paid, implies that his debts are to be paid *by his executor*, and therefore his executor has, by implication, power to sell; but if, instead of merely *implying* that the debts are to be paid by the executor, the testator *says so* in so many words, then the executor has no power to sell! Reader, shut up thy understanding, and bow down before the idol of authority." Williams on Real Assets, p. 94.

an exception obtains where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executors, as is the case here; in which case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executors"(*m*).

But where land is devised to executors, *quâ* executors, and there is a direction to them to pay debts, the land is charged(*n*).

And, if beneficial devisees are also appointed executors, the result is the same(*o*).

But where land is devised to one person, and he and another are appointed executors, and there is a direction to the executors to pay debts, the land devised is not charged, because the devise to one person beneficially who happens to be appointed one of several executors, has no relation to the direction given to the executors(*p*).

Where executors receive beneficially only a small part of the property, there is no charge; thus, where there was a direction to executors to pay debts and a devise to trustees (not the executors) in trust, as to a portion of the land, for the persons named as executors, it was held that the portion held in trust for the executors was not charged(*q*). The question is always one of intention.

The result of the cases on directions to executors is thus summed up by Fry, J., in *Re Bailey*(*r*):—"I do not think

(*m*) *Cook* v. *Dawson*, 29 Beav. at 126; 3 D.F. & J. 127. *Quaere*, whether that would not now charge land, since executors take it for payment of debts.

(*n*) *Dorneay* v. *Borradaile*, 10 Beav. 263; *Hartland* v. *Murrell*, 27 Beav. 204.

(*o*) *Henvell* v. *Whitaker*, 3 Russ. 343; *Dover* v. *Gregory*, 10 Sim. 393; *Harris* v. *Watkins*, Kay 438.

(*p*) *Warren* v. *Davies*, 2 My. & K. 49. See also *Wasse* v. *Helsington*, 3 My. & K. 495.

(*q*) *Symons* v. *James*, 2 Y. & C.C.C. 301.

(*r*) 12 Ch. D. at p. 273.

that there is any conflict in the authorities. They appear to me to come to this—that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest as in *Henvell* v. *Whitaker*(*s*), or only a life interest, as in *Finch* v. *Hattersley*(*t*), or no beneficial interest at all, as in *Hartland* v. *Murrell*(*u*). But, in all the cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate. That would not be so in the present case; the effect would be to subject the part of the testator's real estate which is devised on trust for his daughters to the liability, and to exempt that which is devised to his sons. The case of *Harris* v. *Watkins*(*v*) appears to me to be an authority in favour of this view. There Vice-Chancellor Wood said that there is an exception from the general will when there are two or more executors to whom unequal benefits are given by the will, because 'it might appear improbable from the whole instrument that the parties taking unequal benefits were to be liable to the debts in unequal portions.' So, in the present case, the effect of applying the general rule would be one that it is not probable was intended by the testator, and there being no express words of charge, I feel myself at liberty to come to the conclusion that there was no intention to subject the real estate devised on trust for the daughter to the payment of the debts."

Where there is a general direction that debts shall be paid, it is not always affected in its result of charging the

(*s*) 3 Russ. 343.

(*t*) 3 Russ. 345, n.

(*u*) 27 Beav. 204. This passage is cited by the Court of Appeal with approval: *Re Tanqueray-Willaume & Landau*, 20 Ch. D. at p. 476.

(*v*) Kay 438.

realty by reason of a subsequent express direction to pay debts, legacies, etc., out of a specific piece of land; there being nothing in this inconsistent with the general direction(*w*). So, where there was a general direction to pay debts, and in conclusion the testator gave certain personalty, after and subject to the payment of all his just debts, etc., it was held that this specific reference to payment of debts out of personalty did not relieve the land; for it was not inconsistent with an intention to charge the real estate also as an auxiliary fund(*x*). And a general direction is not affected by devises of particular portions of realty charged with the payment of specific sums, there being no inconsistency in specific charges upon property subject to a general charge(*y*).

In order to restrict the generality of the charge, there must be something repugnant to it in the will, showing that a specific or particular fund, and not the whole, is to be devoted to payment of debts(*z*). In other words, a contrary intention must appear in the will.

The authorities are not harmonious upon the point, but the best exposition of the rule appears to be this, that the general words raise a charge only by implication, and the implication does not arise if there is anything else in the will to explain specifically how the direction is to be carried out. Thus, in *Corser* v. *Cartwright*(*a*), there was a general direction to pay debts, and a devise of the residue of real and personal property, subject to and chargeable with payment of debts, and it was held that the devisee took subject to debts, and was entitled to sell in order to pay them, and

(*w*) *Graves* v. *Graves*, 8 Sim. 43.

(*x*) *Price* v. *North*, 1 Ph. 85.

(*y*) *Taylor* v. *Taylor*, 6 Sim. 246.

(*z*) *Wrigley* v. *Sykes*, 21 Beav. 337: See also *Jones* v. *Williams*, 1 Coll. 156; *Marshall* v. *Gingell*, 2 Ch. D. 790.

(*a*) 3 Ch. App. 971.

that no general charge arose out of the general direction. Lord Justice Mellish said(*b*), "In fact, if you look at the words of the testator, what he says is this:—In the first part of this will he desires all his just debts to be discharged, and then, in the subsequent part of the will, as far as regards his real estate, he shews how that is to be carried out by devising portions of his real estate to J. J. and his heirs specifically charged with the debts. I am therefore of opinion that J. J. was the proper person to sell or mortgage the estate."

Where a will opened with the general direction, which creates a charge by implication only, and then made an express direction that certain lands, naming them, except H. and R., should be sold to pay debts, it was held that the express direction as to certain lands, excepting parts of them, prevented the raising of an implication as to all the land. "He had personal estate, he could not exempt from payment of his debts; he had real, the whole particular part of which he might subject. In declaring his intent as to that, he exempts H. and R. entirely, reserving them as a fund for legacies only. . . . Therefore, though on the first part the court might take the whole real to be charged with debts, yet as there is no express lien on the real estate by these general words, and afterwards he distributes such part of his real for debts, and such for legacies, it is too much to lay hold on the general words to say, the whole should be charged with payment of debts"(*c*).

But where "any specific portion" of the land (to use the words of the statute) is charged, and "the estate so charged" is devised to trustees, the part so charged is subject to the statutory power—the reading being as follows: —"The said devisee or devisees in trust . . . may

(*b*) At p. 977.

(*c*) *Thomas* v. *Britnell*, 2 Ves. Sr. at p. 314. See also *Palmer* v. *Graves*. 1 Keen 545.

raise such debt . . . by a sale and absolute disposition . . . of the *said* real estate, etc."

4. *No Provision for Raising Money.*

(b) There must be no express provision in the will for the raising of the debts, etc. If there is an express power, it, of course, must be followed, the statute being designed to give a power only where none is given by the will.

5. *Estate Devised for Testator's Whole Interest.*

(c) The estate, so charged, must be devised to trustees for the whole estate or interest of the testator therein. If so devised the trustees may sell; if not, they cannot do so. And where trustees are invested with the powers, any person in whom the estate is vested by survivorship, descent or devise, or any person appointed by the High Court to succeed to the trusteeship, may exercise the power(*d*).

In *Re Adams & Perry's Contract*(*e*), Stirling, J., said, "Now, for the existence of the power thus conferred two things are essential: first, that there should be a charge of the real estate with the payment of debts or legacies or other specific sums of money; and, secondly, that the real estate so charged should be devised to a trustee or trustees for the whole of the testator's estate or interest therein." And finding, on the interpretation of the will in question, that the trustees did not take the fee, he held that they had no power of sale, though there was a charge of debts.

The point was not argued as to whether the executors could have sold under a section of the Act now to be considered.

6. *Estate Not Devised for Testator's Whole Interest.*

(d) If the land, so charged, is not devised so as to vest the whole estate or interest of the testator in the trustees,

(*d*) S. 17.
(*e*) L.R. (1899) 1 Ch. at p. 558.

then the executor for the time being may exercise the power.

Thus, in *Re Bradburn & Turner*(*f*), the testator appointed his three sons to be executors and directed them to pay his debts; he then made various devises and bequests to members of his family, and declared that the dispositions were "subject to the payment of all my lawful and just debts." It was held that the case fell within section 18, and that the executors had a power of sale, the estate not being vested in trustees.

The power may be exercised by one or more executors who have taken probate, others renouncing(*g*).

It is important to observe also that under a statute of the reign of Henry VIII(*h*), any executor or executors who "shall take upon him or them the care and charge of the said will" may validly make a sale, where the will directs lands to be sold by the executors, "and a conveyance by such executor or executors shall be as valid and effectual in law as if all of the executors named in the will had joined therein." This clause is declared to be "subject to the provisions of *The Devolution of Estates Act*." Whether this means that such powers are to be exercised only in cases in which the executors are subject to that Act, that is to say, while they have any power under that Act, or whether it means that these powers are suspended while the land is vested in the executors under *The Devolution of Estates Act*, and that after the force of that Act is spent the powers under this clause arise, has yet to be determined. The latter is the more beneficial sense. The clause in question is generally grouped by text writers with the clauses of the statute now in review, and treated as auxilliary thereto(*i*).

(*f*) 3 O.L.R. 351.
(*g*) *Re Fisher & Haslett*, 13 L.R. Ir. 546 (1885).
(*h*) 21 Hen. VIII. c. 4, s. 1; now R.S.O. c. 337, s. 12.
(*i*) See Farwell on Powers, 2nd ed. pp. 89, 90.

The possession of this power would be very important in such a case as *Re Pawley & London and Prov. Bank*(*j*), where probate was granted to some only of the executors, the right being reserved to an absent executor to come in and prove, and where it was held that all the executors being invested with the fee by devolution under the Act should join in the conveyance. In such a case if there were a direction to pay debts, the acting executors could make title under the clause in question, provided that the words "subject to," etc., do not restrict the generality of the enactment.

By section 19 of the Act purchasers or mortgagees are not bound to inquire whether the powers conferred by the previous sections have been duly and correctly exercised by the person or persons acting in virtue thereof(*k*).

And purchasers or mortgagees need not see to the application of the purchase money, but may assume that the trustee or executor is dealing with the land for the purposes of administration(*l*).

7. *Devise Subject to Charge.*

(e) These provisions do not apply where there is a beneficial devise of the land charged specifically with payment.

The provisions made by the sections which have just been under consideration are, by section 20, declared not to "extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest, *charged with debts or legacies,* nor shall they affect the power of any such devisee or devisees to sell or mortgage *as he or they may by law now do.*"

(*j*) L.R. (1900) 1 Ch. 58.

(*k*) And see *Re Bradburn & Turner*, 3 O.L.R. at pp. 352, 353.

(*l*) *Corser* v. *Cartwright*, L.R. 7 H.L. 731; *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465.

The only case in which this section has received judicial construction is *Re Wilson, Pennington* v. *Payne*(*m*). In that case there was a devise to two persons for life with remainder over. Kay, J., said:—"It is argued that where an estate is devised in that way there is no power for the executors to mortgage. I entirely dissent from that view. It seems to me that the meaning of the statute is unmistakable. The meaning is that where a testator has devised his whole estate and interest directly to A., or to A. and B., or to any number of persons as tenants in common, or as joint tenants in fee or in tail, so that the devisee or devisees could themselves mortgage the property, then the executors are not to have the power. But where the estate is devised by way of settlement, so that there is not any individual, or it might be any number of individuals, who is able to make a title to a mortgagee, then that is the very case to which section 16 [the Ontario section 18] is intended to apply. The opposite construction would make that section devoid of meaning."

This case is cited in Farwell on Powers(*n*), without comment or criticism. And where such an authoritative text book passes the subject by, criticism is hazardous

But the case is not satisfactory.

The dictum must be understood with limitations. If the contrast were simply between inability and ability on the part of the devisee to convey, and if this were the sole test of the existence or non-existence of the power in the executors, the generality of the previous section would be much restricted. If the case were interpreted as meaning that the executor can convey only when the devisee cannot, it would be impossible to reconcile it with many cases in which the power has been exercised.

(*m*) 54 L.T.N.S. 600; 34 W.R. 512.
(*n*) 2nd ed. p. 88.

A much broader distinction exists between cases within the prior sections, and those within section 20.

Bearing in mind the distinction between a trust for sale to pay debts, legacies or any sum of money, and a mere charge of debts or specific sums upon land beneficially devised, sections 16 and 18 appear to refer to and comprehend all cases in which the power is to exist in trustees or executors independently of the beneficial interest—in other words where a statutory trust is created which is paramount to, and exists notwithstanding, "any trusts actually declared by the testator"(*o*). Where the land is not devised to trustees, the executor is to have the same power, *i.e.*, he is constituted trustee, with the same paramount statutory trust.

But section 20 applies to beneficial devises in fee simple or fee tail "charged with debts or legacies," which creates no trust, but merely gives to the devisee an encumbered estate.

The distinction between a trust and a mere charge is thus pointed out by Mr. Joshua Williams(*p*):—

"If a sum of money be charged on land, the owner of the land has, in a certain sense, a duty of paying that sum out of the land; and the owner of the money has a right to oblige him to do so, by filing a bill in chancery against him. At the same time the owner of the land is not a trustee, and the owner of the money is not a *cestui que trust*. But if land be vested in a person as trustee, upon trust simply to raise and pay thereout to another a sum of money, a different relation is immediately constituted, the legal owner of the land is a trustee, the owner of the money is a *cestui que trust*"(*q*).

(*o*) See s. 16.
(*p*) Williams on Real Assets, p. 61.
(*q*) See also Ibid. at pp. 40 and 56.

In section 20 it is declared that the previous sections are not to affect the power of any such (beneficial) devisee or devisees to sell or mortgage *as he or they may by law now do*. The italicized words unquestionably show that the section refers to a class of cases well understood at the time, viz., cases of devises subject to charges, and not trusts created by a general direction to pay. *Colyer* v. *Finch*(*r*), falls within this class, where Lord Cranworth said, "Where the estate is devised to others or to another charged with certain payments of debts or legacies, there that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title." Such a case as *Robson* v. *Jardine*(*s*), would also fall within section 20. In that case there was a devise in fee, accompanied by a direction to the devisees to pay a number of pecuniary legacies. On a bill filed by a legatee against the devisees, it was held that the land was charged with payment of the legacies(*t*).

Mr. Williams, after referring to the powers of executors and trustees under the previous sections, thus proceeds(*u*): —"At the same time the power of a devisee of lands simply charged with debts to sell or mortgage, is recognized by the 18th section [the Ontario 20th section]. Another anomaly seems therefore now to have been added to the law. A charge of debts is still merely a charge, except in cases which fall within the 14th and 16th [the Ontario 16th and 18th] sections of the Act. But in these cases the testator, or the legislature on his behalf, has created a fiduciary power. A charge in words has now become a trust in effect. The

(*r*) 5 H.L.C. 905 at p. 922.

(*s*) 22 Gr. 420.

(*t*) The section in question is treated by Theobald, 5th ed. p. 402; Dart, V. & P. 6th ed. p. 700; Shelford R.P. Stat. 9th ed. p. 389; Williams on Real Assets, p. 75; as applying to a devise to a beneficiary charged with payment.

(*u*) Real assets, p. 91.

creditors have persons appointed to look after them; and the trustees and executors, when they agree to act under the will, undertake an express trust, and such a trust as, it is presumed, would enable them (even should legacies only be charged) to give an effectual receipt. . . . This is mentioned to show that a trust is created(*v*). . . . Again, it is presumed that the devisee in fee or in tail of lands simply charged with debts, might set up the Statute of Limitations(*w*) against the creditors; but where the trustees or executors have power to sell, then the creditors would lose nothing by not bestirring themselves, since they have trustees charged with the duty of seeing them paid."

Reverting now to the *dictum* in *Re Wilson*—if the foregoing interpretation of section 20 be correct, then it must be understood with these limitations, viz., that a mere charge of debts, etc., upon land beneficially devised in fee or in tail, does not authorize executors to exercise the statutory power; the devisee merely takes an encumbered estate, and may sell or mortgage, not under a power, because the land is his own, in order to discharge his land from the incumbrance. Or the chargee may bring an action to realize his money out of the land. But where the estate is so devised in settlement that the devisee, or collective devisees, cannot sell or mortgage, then it is not devised in fee or in tail within the meaning of section 20, and the executors have the powers given by section 18.

The case of *Re Eddie*(*x*) is not easy of explanation, and

(*v*) That is under ss. 16 and 18 of the Ontario Statute. It may be noticed that under s. 19 the purchaser need not enquire whether the powers are being properly exercised, which indicates their fiduciary nature.

(*w*) In *Re Stephens*, 43 Ch. D. 39, at p. 43, Kay, J., held that since the R. P. Limitation Act, there was no distinction between a charge of money on land and a trust to pay it out of land for the purpose of the Act; but at the time Mr. Williams wrote the distinction was of importance in ascertaining the different classes of cases which the sections now under consideration covered.

(*x*) 22 Ont. R. 556.

no ground being stated for the decision, it cannot well stand as a precedent. The devise was as follows:—"I devise to my daughter, Ester McBean, the wife of John McBean, her heirs and assigns, lot . . . and I direct Ester McBean to pay to my daughter Jane Currie . . . the sum of fifty dollars within one year after my decease." Ester McBean, the devisee, died before the testator, leaving two children(*y*). The executors proposed to sell, in order to pay the bequest, and the court made an order to that effect. It is difficult to see what power the executors had. The case falls directly within section 36 of *The Wills Act*, by which the devise does not lapse, but is interpreted as if the devisee had died immediately after the death of the testator. The facts are exactly similar to those in *Re Scott*(*z*), where the property devised was held to be so much the property of the deceased devisee that it was subjected to estate duty a second time on account of the devisee's death, which, though it actually occurred before, yet by the statutory fiction was to be treated as if it had occurred after, the death of the testator. The land thus formed part of the estate of the deceased devisee. Though the executors might have applied for a caution to sell for payment of debts, there does not seem to have been any obligation on them to see to the payment of these legacies(*a*).

In any event, regarded as a devise subject to a charge, it clearly falls within section 20 of *The Trustee Act*, and the power of the executors to sell is expressly excluded by that section. If the devisee had survived the testator in fact she could have claimed the land as against the executors, and could have made a good title to a purchaser or

(*y*) Presumably intestate, as the reporter says the land "descended" to the two children.

(*z*) L.R. (1901) 1 Q.B. 228.

(*a*) See cases cited in Shelford, R.P. Stat. 388.

mortgagee for the purpose of relieving her land from the burden imposed upon it.

In conclusion the following summing up may be cited(*b*):—

"The scheme of the Act appears to be briefly as follows:—Where the testator has devised the whole estate (*qu.* legal) to trustees, they are to sell, where he has devised to uses in succession (*i.e.*, not merely to devisees in fee, or in tail), then the executors are to sell. And where he has devised in fee, or in tail, then the devisees are to sell. If the legal estate were outstanding (*e.g.*, in a mortgagee), and the executors desired to sell the equity of redemption only, or to join in a sale by the mortgagee, then, it is submitted that the equitable power of the executors remains unaffected, and that they can sell and give a good discharge. If the legal estate is devised within the meaning of section 14 [Ontario section 16] or the proviso in section 18 [Ontario section 20], it appears to have been assumed that the executors are the proper persons to give a receipt (see *Corser* v. *Cartwright*, L.R. 7 H.L. 731, at p. 740, and *West of England Bank* v. *Murch*, 23 Ch. D. 138, at p. 151)."

8. *Testamentary Power, No One to Exercise It.*

Where there is, in a will, a power, either express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any land, and *no person* is appointed by the testator to execute and carry the same into effect, the executor is to have the power in as full and ample a manner as if he were the person appointed to exercise it(*c*).

And where such a power is given, and no person is appointed by the will to carry it out, "and letters of administration with such will annexed have been by a court of

(*b*) Farwell on Powers, 2nd ed. p. 88.
(*c*) S. 21.

competent jurisdiction in Ontario, committed to any person, and such person has given the additional security before mentioned(*d*), such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber or lease such real estate, and any estate or interest therein, in as full, large and ample a manner and with the same legal effect, as if such last-named person had been appointed by the testator to execute the power''(*e*).

Under these two sections there must be a direction to sell express or implied, and no one named to execute it. Then the executor, or the administrator with the will annexed on giving security as required by section 58 of *The Surrogate Courts Act*, may exercise the power as if he had been appointed by the testator to do so.

No doubt this section will cover cases of charges of debts, legacies or other sums of money, for it covers all cases of express or implied powers without restriction as to the purposes for which they exist. Under section 18, executors only, and not administrators with the will annexed, could exercise the power(*f*), and this section seems to supply the defect and enable the administrator with the will annexed to exercise the power which the executor could have exercised if he had taken probate.

9. *Power to Executor, Administrator* cum test. *May Exercise It.*

Where a power, either express or implied, is by the will given to an executor or executors to sell, dispose of, mortgage, incumber, or lease any land, and where letters of administration with the will annexed have been granted to any person, and such person has given the additional security

(*d*) The security required by s. 58 of *The Surrogate Courts Act*, as mentioned in s. 22 of this Act.

(*e*) S. 23.

(*f*) *Re Clay & Tetley*, 16 Ch. D. 3.

required by section 58 of *The Surrogate Courts Act*, then the administrator with the will annexed may exercise the power(*g*).

Whereas sections 21 and 23 authorize an executor, or an administrator with the will annexed, to exercise the power, where no one is appointed by the will to exercise it, section 22 provides for the cases in which the power is given by the will to an executor or executors, but the executor does not act, and letters of administration with the will annexed are granted.

10. *Conclusion.*

The conclusion seems to be that section 16 provides for the case of a general direction to pay debts, etc., which constitutes a charge on the realty, and the legal estate is devised to trustees upon trusts other than a trust to pay debts, in which case the trustees have a paramount statutory trust to pay the debts, etc., and a power to sell or mortgage.

Section 18 provides for similar cases, where there is no devise to trustees, or a devise which does not invest the trustees with the whole estate or interest of the testator, in which case the executor becomes invested with the statutory trust and has a power to sell or mortgage.

Section 20 provides that the power shall not exist in trustees or executors where the land is devised in fee or in tail to a beneficiary charged with payment.

In the former two cases the purchaser or mortgagee is dealing with a trustee. In the latter, he is dealing, not with a trustee, but with the owner of an estate charged or incumbered with a payment, and, if the charges are not debts, must see that the charges upon the land which he is buying or advancing money upon are satisfied(*h*).

(*g*) S. 22.
(*h*) Williams on Real Assets, p. 62.

11. *Time for Exercising Powers.*

The powers given to executors or trustees may be exercised at any time within twenty years from the death of the testator, without obligation or liability to disclose whether there are any debts unpaid(*i*). After that period there is a presumption that all debts have been paid, particularly if a beneficiary is in possession, and enquiry then becomes proper(*j*).

Sales have been upheld or directed at the following periods: Thirteen years(*k*); twenty-five years(*l*); twenty-seven years(*m*); and thirty-three years(*n*).

12. *Conveyance in Pursuance of Contract.*

By section 24 it is enacted that the executor, administrator with the will annexed, or administrator of a vendor who has contracted in writing to sell land, and has died without providing in his will for the conveyance thereof, or has died intestate, shall convey to the purchaser, by a conveyance such as the vendor would have given, but without covenants, except as against the acts of the grantor, and such conveyance shall be as effectual as if the deceased vendor were alive and had executed the same.

It is a question, since *The Devolution of Estates Act*, how far this enactment is now effective. Where land vests in executors or administrators under that Act, it is to be distributed amongst the heirs or devisees "so far as the said property is not disposed of by . . contract, etc." Section

(*i*) *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465. This limit does not apply to leaseholds: See *Re Venn & Furze's Contract*, L.R. (1894) 2 Ch. 101.

(*j*) *Re Tanqueray-Willaume & Landau*, 20 Ch. D. at pp. 480, 483.

(*k*) *Greetham* v. *Colton*, 34 Beav. 615.

(*l*) *Forbes* v. *Peacock*, 1 Ph. 717.

(*m*) *Sabin* v. *Heape*, 27 Beav. 353.

(*n*) *Wrigley* v. *Sykes* 21 Beav. 337.

13 of that Act provides for the vesting of the land "in the devisees or heirs *beneficially* entitled thereto." In other words section 13 merely provides for automatic distribution at a certain date, if the personal representative does not previously distribute, amongst those beneficially entitled. Property the subject of a previous contract would not shift under this clause, because the heirs or devisees are not beneficially entitled to it, and therefore the executor or administrator in any case would retain the land, and by right of property would be able to convey. Before section 13 of the Act was passed there would have been no doubt of this, as all land passed to the personal representative and remained vested in him until conveyed. And if section 13 is restricted in its application to property passing to a beneficiary as of right, as it appears to be, then the result will be the same.

Assuming, however, that cases may arise in which the powers granted by the section in question can be exercised —the conditions necessary for the application of it are (1) a contract in writing for the sale of the land; (2) intestacy of the vendor, or no provision made by his will for conveying the land to the purchaser; (3) liability of the deceased vendor to be called on for a conveyance if he were alive.

(1) There must be a contract in writing. That is to say, the whole contract must be in writing. It will not be sufficient that there should be liability by reason of such a document as would amount to a memorandum in writing of the contract signed by the deceased vendor and sufficient to satisfy the Statute of Frauds. Such a memorandum is not a contract, but is the statutory evidence of the contract. Neither would a verbal contract, enforceable by reason of part performance, be within the Act.

It is not necessary that the purchase money should have been paid to the vendor; it is the policy of this section that the hand which receives the money should make the conveyance. But where the purchase money has been paid to a

vendor in his lifetime, he becomes a bare trustee for the purchaser, and the legal estate in that case passes to his personal representative under section 7 of *The Trustee Act*.

(2) Secondly, there must be an intestacy, or, where there is a will, no provision made in the will for a conveyance. Where there is a direction in the will as to conveyance or disposition of the land it constitutes a trust, and the trustee must execute it. But where nothing is said in the will, then the executor, or the administrator with the will annexed becomes a statutory trustee to convey.

(3) There must be such a state of circumstances as that if the vendor were alive he would be liable to convey. This seems to amount to no more than that there must be an enforceable contract.

CHAPTER XXIII.

Distress for Rent by Executors and Administrators.

1. *When Executor or Administrator May Distrain.*
2. *Tenant Must be in Possession.*
3. *Where Tenant has Died.*

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1. *When Executor or Administrator May Distrain.*

By *The Trustee Act* (*o*) "The executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living." And "such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

This statute was taken from an English Act (*p*), and is an infringement on the rule of the common law that the distrainor must have in himself the reversion to which the rent is incident. This artificial right, of course, is independent of the right of property. Now that *The Devolution of Estates Act* vests the property in the personal representative, a distress might be justified either by right of property or under the statute. Even now, however, it might occur

(*o*) R.S.O. c. 129, ss. 13, 14.
(*p*) 3 & 4 Wm. IV. c. 42, ss. 37, 38.

that land would vest in the beneficiaries, there being some arrears of rent still due, and the right of distress under *The Trustee Act* would remain in the personal representative.

The right of distress at common law is incident to the reversion. And although by this statute it is severed from the reversion, for the time being, yet it can only exist while the reversion exists. That is to say, if the reversion were extinguished by the Statute of Limitations the right of distress which is an incident of it must disappear also.

2. *Tenant Must be in Possession.*

In order that the right may be exercised the statute requires that "the tenant from whom the arrears became due" should "continue his possession." For the elucidation of this part of the enactment the decisions upon a similar phrase in another statute may be looked at. By a statute of Anne (*q*), "Any person having rent in arrear . . may distrain for such arrears after the determination of the said lease, in the same manner as he might have done if such lease had not been ended or determined; provided that such distress be made within the space of six months after the determination of such lease, and during the continuance of such landlord's title or interest, and *during the possession of the tenant from whom such arrears became due.*"

The tenancy in such a case must be determined by lapse of time, either natural at the expiration of the term, or by notice to quit (*r*). The statute does not apply to a case where a tenant has committed an act of forfeiture and the lease has been determined by entry (*s*).

(*q*) Now R.S.O. c. 342, s. 2.

(*r*) *Doe* v. *Williams*, 7 C. & P. 322.

(*s*) *Grimwood v. Moss*, L.R. 7 C.P. at p. 365; *Kirkland* v. *Briancourt*, 6 T.L.R. 441.

Where a new tenancy is created and the possession of the tenant is referable thereto, it is not such a possession as will enable a distress to be made under this enactment (*t*). The possession must be an actual and exclusive possession. Hence, where a tenant left the demised premises without stating anything as to his intentions, but left a cow and some pigs on the premises, and an incoming tenant entered, it was held that the landlord could not distrain; there being no evidence that the cow and pigs were left with any intention of retaining possession (*u*). The possession need not be tortious, but may be with the landlord's permission; nor need it be of the whole of the demised premises (*v*).

3. *Where Tenant has Died.*

Where a tenant died in possession during the term and his administratrix continued in possession, and after the expiration of the term, a distress was made, it was upheld under this enactment (*w*). In a later case (*x*), Blackburn, J., said:—"In *Braithwaite* v. *Cooksey*, indeed, the Court allowed a distress to be good during the possession of the administratrix; but they do not give any reasons for their judgment, and it seems to have been a peculiar case—the tenancy was not determined by the death of the lessee, but continued after his death, so that his administratrix became tenant under the lease; whence it is clear that a distress would lie for rent which, accruing in the lifetime of the lessee, did not fall due until after his death and in the time of the tenancy of the administratrix; and that may have

(*t*) *Wilkinson* v. *Peel*, L.R. (1895) 1 Q.B. 516. See and cf. *The Registry Act*, as to possession under leases not requiring registration: R.S.O. c. 136, s. 39, and *Davidson* v. *McKay*, 26 U.C.R. 306.

(*u*) *Taylerson* v. *Peters*, 7 A. & E. 110; *Gray* v. *Stait*, 11 Q.B.D. at p. 673, per Bowen, L.J.

(*v*) *Taylerson* v. *Peters*, supra.

(*w*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465.

(*x*) *Turner* v. *Barnes*, 2 B. & S. 435, at p. 453.

been such a case. If this is not an explanation of that case, I cannot agree that, when a tenancy has been determined by the death of the tenant, arrears of rent may be distrained for, within the words of section 7, 'during the possession of the tenant from whom such arrears became due.' ''

And so, where a tenancy at will determined by the death of the tenant, and his widow remained in possession, and a distress was made, and she afterwards took out letters of administration, it was held that the distress would not lie; for the term having been ended by the death of the tenant, it was impossible that he could be in possession; his widow being wrongfully in possession did not represent him when the distress was made; and the letters of administration did not relate back so as to make her possession rightful; and therefore there was no one to bring the possession within the words of the statute (*y*).

(*y*) Ibid.

APPENDIX OF STATUTES.

APPENDIX OF STATUTES.

THE SURROGATE COURTS ACT.

R.S.O. CHAPTER 59.

JURISDICTION AND POWERS OF SURROGATE COURTS.

21. Probate or letters of administration by whatever Court granted shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. R.S.O. 1887, c. 50, s. 18 (4); 53 V. c. 17, s. 3.

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PRACTICE.

Proofs to lead grant.

38. On every application to a Surrogate Court for probate of will or letters of administration where the testator or intestate was resident in Ontario at the time of his death, the place of abode of the testator or intestate at the time of his death shall be made to appear by affidavit of the person or some one of the persons making the application; and thereupon and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration (as the case may be) may be granted under the seal of the Surrogate Court to which the application has been so made; and the probate or letters of administration shall have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. R.S.O. 1887, c. 50, s. 35; 53 V. c. 17, s. 7.

39. On every application for probate of a will or letters of administration where the testator or intestate had no fixed place of abode in or resided out of Ontario at the time of his death, the same shall be made to appear by affidavit of the person or some one of the persons applying for the probate or administration, and that the deceased died leaving personal or real property within the county in the Surrogate Court ot which application is made, or leaving no personal or real property in Ontario as the case may be, and that notice of the application has been published at least three times successively in the *Ontario Gazette;* and thereupon and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration, as the case may be, may be granted under the seal of such Surrogate Court; and the probate

or letters of administration shall have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. R.S.O. 1887, c. 50, s. 36; 53 V. c. 17, s. 8.

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42. If the next of kin, usually residing in Ontario and regularly entitled to administer, happens to be absent from Ontario, the Surrogate Court having jurisdiction in the matter may, in its discretion, grant a temporary administration, and appoint the applicant, or such other person as the Court thinks fit, to be administrator of the property of the deceased person for a limited time, or to be revoked upon the return of such next of kin as aforesaid. R.S.O. 1887, c. 50, s. 39; 53 V. c. 37, s. 11.

43. The administrator so appointed shall give such security as the Court directs, and shall have all the rights and powers of a general administrator, and shall be subject to the immediate control of the Court. R.S.O. 1887, c. 50, s. 40.

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ADMINISTRATION PENDENTE LITE.

56. Pending an action touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Court in which an action is pending may appoint an administrator of the property of the deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of the property; and every such administrator shall be subject to the immediate control of the Court and act under its direction; and the Court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the Court thinks fit. R.S.O. 1887, c. 50, s. 53; 53 V. c. 17, s. 13.

ADMINISTRATION WITH WILL ANNEXED.

57. Where administration is granted with the will annexed, a bond shall (unless it is otherwise provided by law) be given to the Judge of the Court as in other cases and with like effect and unless otherwise provided for by this Act or the Rules or Orders relating to Surrogate Courts from time to time in force. the practice and procedure in respect to such administrations and in respect to such bonds and the assignment thereof shall, so far as the circumstances of the case will admit, be according to the practice in such cases in Her Majesty's Court of Probate in England, on the 5th day of December, 1859. R.S.O. 1887, c. 50, s. 54.

58. In every case where any person applies to be appointed an administrator with the will annexed of a person who died before the first day of July, 1886, and a bond is by law required to be given, he

shall in his application state, and in his affidavit of the value of the property devolving shall depose to the value or probable value of all the real estate over which, or over any estate in which, the executor or executors named in the will or codicil were by the said will or codicil clothed with any power of disposition, or of all the real estate, which in case of no executor being appointed, was by the will or codicil directed to be disposed of, without any person being appointed to effect such disposition; and in every such case the bond to be given by such person upon his obtaining a grant of administration with the said will annexed, shall, as respects the amount of the penalty of the bond, and the justification of the sureties, include the amount of the value or probable value so stated and deposed to; and the condition of the bond, in addition to the other provisions thereof, shall provide that the administrator shall well and truly pay over and account for, to the person or persons entitled to the same, all moneys and assets to be received by him for or in consequence of the exercise by him of any power over real estate created by the will or codicil, and which may be exercised by him. R.S.O. 1887, c. 50, s. 55; 53 V. c. 17, s. 14.

POWER AS TO APPOINTMENT OF ADMINISTRATOR.

59. Where a person has died wholly intestate as to his property, or leaving a will affecting property, but without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the Court to be necessary or convenient in such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the property of the deceased or of any part of such property other than the person who if this section had not been enacted would by law have been entitled to a grant of administration to such property, it shall not be obligatory upon the Court to grant administration of the property of such deceased person to the person who if this section had not been enacted would by law have been entitled to a grant thereof, but the Court in its discretion may appoint such person as the Court thinks fit upon his giving such security (if any) as the Court directs, and every such administration may be as limited as the Court thinks fit. R.S.O. 1887, c. 50, s. 56; 53 V. c. 17, s. 15.

60. After a grant of administration no person shall have power to sue or prosecute any action, or otherwise act as executor of the deceased as to the property comprised in or affected by such grant of administration, until such administration has been recalled or revoked. R.S.O. 1887, c. 50, s. 57; 53 V. c. 17, s. 16.

61. A person entitled to take out letters of administration to the estate of a deceased person shall be entitled to take out such letters

limited to the personal estate of the deceased, exclusive of the real estate. R.S.O. 1887, c. 50, s. 58.

REVOCATION OF TEMPORARY GRANTS.

62. In case, before the revocation of any temporary administration, proceedings have been commenced by or against the administrator so appointed, the Court in which the proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which has been made consequent thereupon, and the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceedings had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as the Court may direct. R.S.O. 1887, c. 50, s. 59.

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EXECUTOR RENOUNCING.

65. Where a person renounces probate of the will of which he is appointed executor (or one of the executors), his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may without any further renunciation go, devolve and be committed in like manner as if he had not been appointed executor. R.S.O. 1887, c. 50, s. 62.

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CONSTRUCTION OF ACT.

89. If any of the provisions of this Act shall be found to be inconsistent with the provisions of *The Devolution of Estates Act*, this Act shall be construed so as to conform in all respects with the true intent and meaning of *The Devolution of Estates Act*. 53 V. c. 17, s. 20.

THE EXECUTION ACT.

R.S.O. CHAPTER 77.

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33. (1) Any estate, right, title or interest in lands which, under section 8 of The Act respecting the Transfer of Real Property, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the person might himself have done.

(2) The right of a married woman to dower shall not be deemed seizable or salable under execution before the death of her husband. R.S.O. 1887, c. 64, s. 25.

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SALES AGAINST EXECUTORS.

35. The title and interest of a testator or intestate in real estate may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate, against his executor or administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased, if living. R.S.O. 1887, c. 64, s. 26; c. 110, s. 14.

THE DEVOLUTION OF ESTATES ACT.

R.S.O. CHAPTER 127.

1. This Act may be cited as *"The Devolution of Estates Act."* R.S.O. 1887, c. 108, s. 1.

2. Sections 3 to 10 inclusive of this Act shall apply only to the estates of persons dying on and after the 1st day of July, 1886. R.S.O. 1887, c. 108, s. 2.

3. Subject as above this and the next seven sections of this Act shall apply:—

(*a*) To all estates of inheritance in fee simple, or limited to the heir as special occupant,* in any tenements or hereditaments in Ontario, whether corporeal or incorporeal.

(*b*) To chattels real in Ontario.

(*c*) To all other personal property of any person who has died domiciled in Ontario.

Provided, that all real or personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable. R.S.O. 1887, c. 108, s. 3.

4. (1) All such property as aforesaid which is vested in any person, or is comprised in any such disposition as aforesaid made by him, shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed.

(2) Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed of real estate aforesaid.

(3) Any husband who, if sections 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed or instrument in writing executed within six months after his wife's death, and attested by at least one witness, elect to take such interest in the real and personal

*See 2 Edw. VII. c. 1, s. 3.

property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of this Act.

(4) Where any person applies to be appointed an administrator, and the administration applied for is a general administration, the application and the affidavit in support thereof shall shew the particulars of the real estate of the deceased, and the value or probable value thereof; and the amount of the security to be given, shall have reference to such value as well as to the value of the other estate of the deceased. R.S.O. 1887, c. 108, s. 4.

5. The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had predeceased her. 60 V. c. 14, s. 32.

6. When a person shall die without leaving issue, and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister. R.S.O. 1887, c. 108, s. 6.

7. The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts. R.S.O. 1887, c. 108, s. 7.

8. (1) Where infants are concerned in real estate which but for the preceding sections of this Act would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the Official Guardian of Infants appointed under *The Judicature Act*, or, in the absence of such consent or approval, without an order of the High Court.

(2) The High Court may appoint the local Judge of any county or the local Master therein, as local Guardian of Infants, in such county during the pleasure of the Court, with authority to give such written consent or approval as aforesaid instead of the Official Guardian; and the Official Guardian and local Guardian shall be subject to such general orders as the High Court may from time to time make in regard to their authority and duty under this Act. R.S.O. 1887, c. 108, s. 8.

9.* Subject as hereinbefore provided, the legal personal repre-

* See 2 Edw. VII. c. 17, s. 9.

sentatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them. R.S.O. 1887, c. 108, s. 9.

10. When any portion of the real estate of a person dying on or after the first day of July, 1886, vests in his personal representatives under this Act, such personal representatives in the interpretation of any statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he is interested, shall, while the estate remains in them, be deemed in law his heirs, as respects such portion, unless a contrary intention appears, but nothing in this section contained shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument. 60 V. c. 14, s. 31.

11. (1) Where the personal representatives of a deceased person are desirous of selling any land devolving upon them free from dower they may apply to a Judge of the High Court, and if the Judge approves he may by an order to be made by him in a summary way, upon such evidence as to him seems meet, and either *ex parte* or upon notice (to be served personally unless the Judge otherwise directs) determine whether the land shall be sold free from the right of the doweress; and in making such determination regard shall be had to the interest of all the parties.

(2) No *ex parte* order shall be made unless where service upon the doweress cannot be conveniently made.

(3) If a sale free from such dower is ordered, all the right and interest of such doweress shall pass thereby; and no conveyance or release to the purchaser shall be required from such doweress; and the purchaser, his heirs and assigns, shall hold the premises freed and discharged from all claims by virtue of the rights of any such doweress, whether the same be to any undivided share, or to the whole or any part of the premises sold.

(4) In such case the Court or Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to dower as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such right or interest; or may direct the payment, to the person entitled to dower, of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof, as may be necessary. 60 V. c. 14, s. 30.

12. (1) The real and personal estate of every man dying, after

the first day of July, 1895, intestate and leaving a widow but no issue shall in all cases where the net value of such real and personal estate does not exceed $1,000, belong to his widow absolutely and exclusively. 58 V. c. 21, s. 2.

(2) Where the net value of the real and personal estate of any person who shall die intestate as in this section mentioned shall exceed the sum of $1,000, the widow of such intestate shall after payment of debts, funeral and testamentary expenses and expenses of administration be entitled to $1,000, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estate, after payment as aforesaid, for such $1,000, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment. 58 V. c. 21, s. 3.

(3) The provision for the widow intended to be made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal estate of the intestate remaining after payment of the sum of $1,000 and interest as aforesaid, in the same way as if such residue had been the whole of the intestate's real and personal estate, and this section had not been enacted. 58 V. c. 21, s. 4.

13.* (1) Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, subject to *The Land Titles Act* in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the Registry Office, or Land Titles Office where the land is under *The Land Titles Act*, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered. 54 V. c. 18, s. 1 (1); 56 V. c. 20, ss. 3, 4; 60 V. c. 3, s. 3; c. 14, s. 29 part.

(2) The caution may be in the form or to the effect following:—

We (A.B. and C.D.), executors of (or *administrators with the will annexed of*, or *administrators of*) , who died on or about the day of , do hereby certify that it may be

* See 2 Edw. VII. c. 17, ss. 1, 2, 3.

necessary for us under our powers and in fulfilment of our duties as executors (or *administrators*) to sell the real estate of the said , or part thereof, (or *the caution may specify any particular parts or parcels*), and of this all persons concerned are hereby required to take notice:—

And the execution of the said caution shall be verified by the affidavit of a subscribing witness in manner prescribed by *The Registry Act*.

(3) In case the caution specifies the tracts or parcels which the executors or administrators may have occasion to sell, the caution shall be effectual as to those tracts or parcels only.

(4) The executors or administrators before the expiration of the twelve months may file a certificate withdrawing the caution mentioned in the preceding sub-sections; or withdrawing the same as to any parcel of land specified in such certificate and such certificate of withdrawal may be to the effect following:—

We executors (or *administrators*) of do hereby withdraw the caution heretofore registered with respect to the real estate of the said (or *as the case may be*). 54 V. c. 18, s. 1 (2-4).

(5) The certificate of withdrawal shall be verified by the affidavit of a subscribing witness, which shall be in the following form, or to the like effect:—

I, G.H., etc., make oath and say: I am well acquainted with A.B. and C.D. named in the above certificate; that I was present and did see the said certificate signed by the said A.B. and C.D.; that I am a subscribing witness to the said certificate, and I believe the said A.B. and C.D. to be the persons who registered the caution referred to in the said certificate. 60 V. c. 15, sched. A. (42).

(6) Before the expiry of a caution another caution may be registered, and so on from time to time as long as the executors or administrators consider such action necessary, and every such caution shall continue in force for twelve months from the time of its registration. 60 V. c. 15, sched. A. (43).

(7) The limitation of the operation of this section to the real estate of persons dying on or after the 4th day of May, 1891, shall not affect any conveyance made before the 13th day of April, 1897. 60 V. c. 14, s. 29, part.

14.* Where executors or administrators have, through oversight or otherwise, omitted to register a caution within twelve months after the death of the testator or intestate, as provided by the preceding section, or have omitted to re-register a caution as required by the said section, they may register the caution in either case notwith-

* See 2 Edw. VII. c. 17, ss. 4, 10.

standing the lapse of the twelve months respectively provided for the said purposes, provided they register therewith:—

1. The affidavit of verification therein mentioned;
2. A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be) under their powers and in fulfilment of their duties in that behalf;
3. The consent in writing of any adult devisees or heirs whose property or interest would be affected; and
4. An affidavit verifying such consent; or
5. In the absence and in lieu of such consent, an order signed by a High Court Judge or County Court Judge, or the certificate of the Official Guardian approving of and authorizing the caution to be registered, which order or certificate the Judge or Official Guardian may make with or without notice on such evidence as satisfies him of the propriety of permitting the caution to be registered; and the order to be registered shall not require verification and shall not be rendered null by any defect or supposed defect of form or otherwise. 56 V. c. 20, s. 1.

15.* In case of such caution being registered or re-registered under the authority of the preceding section such caution shall have the same effect as a caution registered within twelve months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators. 56 V. c. 20, s. 2.

16.† (1) Executors and administrators in whom the real estate of a deceased person is vested under this Act shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, [and there are no debts]‡ no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or

* See 2 Edw. VII. c. 17, s. 11.

† See 2 Edw. VII. c. 17, s. 8.

‡ These words were struck out by 63 V. c. 17, s. 17.

devisees, unless the sale is made with the approval of the Official Guardian appointed under *The Judicature Act*; and for this purpose the Official Guardian aforesaid shall have the same powers and duties as he has in the case of infants.

(2) This section shall not apply to any administrator where the letters of administration are limited to the personal estate, exclusive of the real estate, and shall not derogate from any right possessed by an executor or administrator independently of this Act. 54 V. c. 18, s. 2.

17. (1) Sales of such real estate as aforesaid made prior to the 4th day of May, 1891, by executors and administrators with the written consent or approval of the Official Guardian, as required by section 8 of this Act, shall be deemed valid as respects all the heirs and devisees, whether infants or of full age, though there were no debts of the deceased to be paid out of the proceeds.

(2) The approval of the Official Guardian to be expressed in writing under his hand shall be sufficient to confirm and render valid, as respects all the heirs and devisees though there were no debts of the deceased to be paid out of the proceeds, any sale made prior to the said 4th day of May, 1891, in any case in which the value of the infant's share is under $50.

(3) Sales of such real estate as aforesaid made prior to the said 4th day of May, 1891, by executors and administrators in other cases shall be adjudicated upon according to equity and good conscience in view of all the circumstances and every sale which has been made in good faith and for a fair consideration shall be held valid.

(4) Every sale made prior to the said 4th day of May, 1891, shall be valid unless it was questioned in an action within one year from the said date, except in any case where under this Act the approval of the Official Guardian was required and was not obtained.

(5) In case any sale made prior to the 4th day of May, 1891, is now, or heretofore has been, the subject of an action, and relief is given to either party under this section, the party obtaining such relief shall pay the costs of the action. 54 V. c. 18, s. 3.

18. Where prior to the 4th day of May, 1891, there had been a sale by executors or administrators, no infant being concerned and no consent or approval of the Official Guardian having been obtained, but the person or one of the persons, beneficially entitled has received and accepted, or shall hereafter receive and accept, his share or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person. 54 V. c. 18, s. 4.

19. Persons *bona fide* purchasing real estate from the executors or administrators of a deceased owner in manner authorized by this

Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner not specifically charged thereon otherwise than by his will, and from all claims of his devisees and heirs at law as such, and the purchasers shall not be bound to see to the application of the purchase money. 54 V. c. 18, s. 5.

20. Persons *bonâ fide* purchasing real estate from a devisee whose devise has been assented to by the executors or administrators by deed, or by writing under their hand, or *bonâ fide* purchasing the real estate from any heir at law or devisee to whom the same has been conveyed by the executors or administrators shall be entitled to hold the same freed and discharged from any unsatisfied debts and liabilities of the deceased owner not specifically charged thereon otherwise than by his will; but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir at law or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators, or permitted to become vested, to the prejudice of such creditors. 54 V. c. 18, s. 6.

21. (1) The Official Guardian shall have power with the approval of the Lieutenant-Governor in Council, or of the Judges of the High Court of Justice, to make rules regulating the practice and procedure to be followed in all proceedings under this Act, in which the privity or consent of such Official Guardian shall be required; and also to frame a tariff of the fees to be allowed and paid to solicitors for services rendered in such proceedings. Such Rules and tariffs when approved as aforesaid shall be published in the *Ontario Gazette* and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at the next session after the promulgation thereof.

(2) In case the Lieutenant-Governor sees occasion in consequence of the illness or absence of the Official Guardian or for any other cause, he may appoint a person to act as Deputy *pro tem.* of the Official Guardian for the purposes of this Act; and a deputy appointed by the Lieutenant-Governor shall have all the powers of the Official Guardian as respects the said purposes.

(3) Affidavits may be used in proceedings taken in pursuance of this Act; and such affidavits may be sworn before any Commissioner for taking affidavits or before a Notary Public. 54 V. c. 18, s. 7.

22. The words and expressions hereinafter mentioned which in their ordinary signification have a more confined or different meaning, shall, where they occur in the next fourteen sections, numbered from 23 to 36 inclusive, except where the nature of the provision or

the context thereof excludes such construction, be interpreted as follows, that is to say:

1. "Land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency;

2. "The purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land becomes part of, or descendible in the same manner as, other land acquired by descent;

3. "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation, as where he is a child or other issue;

4. "Descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor;

5. "The person last entitled" to land shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof;

6. "Assurance" shall mean any deed or instrument (other than a will), by which any land may be conveyed or transferred at law or in equity. R.S.O. 1887, c. 108, s. 11 (1-6).

DESCENTS BEFORE 1ST JULY, 1834.

23. This Act shall not extend to any descent which took place on the death of any person who died before the first day of July, 1834. R.S.O. 1887, c. 108, s. 12.

DESCENTS SINCE 1ST JULY, 1834.

24. The next six sections of this Act, numbered from 25 to 30 inclusive, shall not have operation retrospectively to a period of time anterior to the sixth day of March, 1834, so as, by force of any of their provisions, to render any title valid, which in regard to any particular estate had, prior to that day, been adjudged, or has been or may be in any suit which was depending on that day, adjudged invalid on account of any defect, imperfection, matter or thing which is by such sections altered, supplied or remedied; but in every such case the law in regard to any such defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to be as

If those sections of this Act had not been passed. R.S.O. 1887, c. 108, s. 13.

25. In every case on and after the first day of July, 1834, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it is proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it is proved that he inherited the same; and, in like manner, the last person from whom the land is proved to have been inherited shall in every case be considered to have been the purchaser, unless it is proved that he inherited the same. R.S.O. 1887, c. 108, s. 14.

26. Where land is devised by a testator dying after the first day of July, 1834, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and where any land is limited by any assurance, executed after the said first day of July, 1834, to the person or to the heirs of the person who thereby conveys the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as of his former estate or part thereof. R.S.O. 1887, c. 108, s. 15.

27. Where a person acquires land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the first day of July, 1834, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator dying after the said first day of July, 1834, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. R.S.O. 1887, c. 108, s. 16.

28. Where the person from whom the descent of any land is to be traced has had any relation who, having been attainted, died before such descent took place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land escheated in consequence of such attainder before the first day of July, 1834. R.S.O. 1887, c. 108, s. 17.

29. Proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. R.S.O. 1887, c. 108, s. 18.

30. Where any assurance executed before the said first day of July, 1834, or the will of any person who died before that day, contains any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been passed shall become entitled by virtue of such limitation or gift, whether the person named as ancestor was or was not living on or after the said first day of July, 1834. R.S.O. 1887, c. 108, s. 19.

DESCENTS BETWEEN 1ST JULY, 1834, AND 1ST JANUARY, 1852.

31. As respects every descent between the first day of July, 1834, and the thirty-first day of December, 1851, both days included, and as respects any descent not included or provided for in the sections of this Act numbered from 41 to 67, both included, the following sections, numbered from 32 to 36, both included, shall apply retrospectively to the first day of July, 1834, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of July, 1834. R.S.O. 1887, c. 108, s. 21.

32. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. R.S.O. 1887, c. 108, s. 22.

33. Every lineal ancestor shall be capable of being heir to any of his issue, and in any case where there is no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. R.S.O. 1887, c. 108, s 23.

34. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants have failed. R.S.O. 1887, c. 108, s. 24.

35. Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to

the mother of a less remote male paternal ancestor, or her descendants; and where there is a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants. R.S.O. 1887, c. 108, s. 25.

36. Any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir, and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. R.S.O. 1887, c. 108, s. 26.

DESCENTS BETWEEN 1ST JANUARY, 1852, AND 1ST JULY, 1886.

37. The twenty-seven sections numbered from 41 to 67, both included, shall apply retrospectively to the first day of January, 1852, inclusive, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of January, 1852, but sections 38 to 55 inclusive shall not apply to estates of persons dying on or after the first day of July, 1886; and sections 56 to 67 inclusive shall, as to the estates of such last mentioned persons, apply only subject to the provisions of sections 1 to 21 inclusive. 50 V. c. 15, s. 3.

38. In the said twenty-seven sections of this Act numbered from 41 to 67, both inclusive—

1. "Real estate" shall be construed to include every estate, interest and right, legal and equitable, held in fee simple or for the life of another (except as in section 59 is excepted) in lands, tenements and hereditaments in Ontario, but not such as are determined or extinguished by the death of the intestate seised or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and

2. "Inheritance," as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the said twenty-seven sections. R.S.O. 1887, c. 108, s. 28.

39. Where, in the said sections, numbered from 41 to 67, both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and where any person is des-

cribed as having died, it shall be understood that he died before such intestate. R.S.O. 1887, c. 108, s. 29.

40. Where in any of the said sections the expressions "where the estate came to the intestate on the part of the father" or "mother," as the case may be, are used, the same shall be construed to include every case where the inheritance came to the intestate by devise, gift, or descent from the parent referred to, or from any relative of the blood of such parent. R.S.O. 1887, c. 108, s. 30.

41. Where any person dies seised in fee simple or for the life of another of any real estate in Ontario, without having lawfully devised the same, such real estate shall descend or pass by way of succession in manner following, that is to say:—

Firstly. To the lineal descendants of the intestate, and those claiming by or under them, *per stirpes*;

Secondly. To his father;

Thirdly. To his mother; and

Fourthly. To his collateral relatives

subject in all cases to the rules and regulations hereinafter prescribed. R.S.O. 1887, c. 108, s. 31.

42. If the intestate leaves several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate the common degree of consanguinity may be. R.S.O. 1887, c. 108, s. 32.

43. If one or more of the children of such intestate are living and one or more are dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died; so that each child who is living shall inherit such share as would have descended to him if all the children of the intestate, who have died leaving issue, had been living; and so that the descendants of each child who is dead shall inherit in equal shares the share which their parent would have received if living. R.S.O. 1887, c. 108, s. 33.

44. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, are of unequal degrees of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity who have died leaving issue, been living, and so that the issue of the descendants who have died, shall respectively take the shares which their parents, if living, would have received. R.S.O. 1887, c. 108, s. 34.

45. In case the intestate dies without lawful descendants and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and

such mother is living; and if such mother is dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; and if there are no such brothers or sisters, or their descendants living such inheritance shall descend to the father. R.S.O. 1887, c. 108, s. 35.

46. If the intestate dies without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and brothers or sisters, or the descendants of brothers or sisters, then the inheritance shall descend to the mother during her life, and the reversion to such brothers or sisters of the intestate as are living, and the descendants of such as are dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. R.S.O. 1887, c. 108, s. 36.

47. If there is no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there are several of such relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. R.S.O. 1887, c. 108, s. 37.

48. If all the brothers and sisters of the intestate are living the inheritance shall descend to such brothers and sisters; and if any one or more of them are living and any one or more are dead, then to the brothers and sisters and every of them who are living, and to the descendants of such brothers and sisters as have died, so that each brother or sister who is living shall inherit such share as would have descended to him or her, if all the brothers or sisters of the intestate who have died leaving issue had been living, and so that such descendants shall inherit in equal shares the share which their parent, if living, would have received. R.S.O. 1887, c. 108, s. 38.

49. The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, wherever such descendants are of unequal degree. R.S.O. 1887, c. 108, s. 39.

50. If there is no heir entitled to take under any of the preceding thirteen sections, the inheritance if the same came to the intestate on the part of his father, shall descend:

Firstly. To the brothers and sisters of the father of the intestate in equal shares, if all are living;

Secondly. If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to

the descendants of such of the said brothers and sisters as have died —in equal shares;

Thirdly. If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R.S.O. 1887, c. 108, s. 40.

51. If there be no brothers or sisters, or any of them, of the father of the intestate, and no descendants of such brothers or sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. R.S.O. 1887, c. 108, s. 41.

52. In all cases not provided for by the next preceding fifteen sections, where the inheritance came to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed in section 50, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there are no such brothers and sisters or descendants of them, then the inheritance shall descend to the brothers and sisters, and their descendants, of the intestate's father, as before prescribed. R.S.O. 1887, c. 108, s. 42.

53. In cases where the inheritance did not come to the intestate on the part of either the father or the mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R.S.O. 1887, c. 108, s. 43.

54. Relatives of the half blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise or gift from some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. R.S.O. 1887, c. 108, s. 44.

55. On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of Distribution of Personal Estate. R.S.O 1887, c. 108, s. 45.

GENERAL PROVISIONS.

56. Where there is but one person entitled to inherit, according to the provisions of section 37 and following sections of this Act, he

shall take and hold the inheritance solely; and where an inheritance, or a share of an inheritance, descends to several persons under such provisions, they shall take as tenants in common, in proportion to their respective rights. R.S.O. 1887, c. 108, s. 46.

57. Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. R.S.O. 1887, c. 108, s. 47.

58. Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R.S.O. 1887, c. 108, s. 48.

59. The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding twenty-two sections of this Act, nor except as provided by section 31 of *The Wills Act of Ontario* shall the same affect any limitation of any estate by deed or will, or any estate which, although held in fee simple or for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last twenty-two sections of this Act numbered from 37 to 58, both included had not been passed. R.S.O. 1887, c. 108, s. 49.

60. If any child of an intestate has been advanced by the intestate by settlement, or portion of real or personal estate, or both of them, and the same has been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement is equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. R.S.O. 1887, c. 108, s. 50.

61. If such advancement is not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as is sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as nearly as can be estimated. R.S.O. 1887, c. 108, s. 51.

62. The value of any real or personal estate so advanced shall be deemed to be that, if any, which has been acknowledged by the child by any instrument in writing, otherwise such value shall be estimated according to the value of the property when given. R.S.O. 1887, c. 108, s. 52.

63. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act. R.S.O. 1887, c. 108, s. 53.

64. The parties authorized to make partition of any such real estate according to law, shall receive from any of the persons entitled to a share of such real estate, an offer or proposition to purchase the share or shares of the other parties interested therein, giving the preference to the person who would have been the heir-at-law thereto, had section 37 and the following sections of this Act not been passed; and next after such heir-at-law, giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R.S.O. 1887, c. 108, s. 54.

65. The parties so authorized to make such partition shall certify particularly to the Court in which proceedings for a partition are commenced or pending, the particulars of such offer or proposition for purchase, the nature, quantity and value of the estate or share proposed to be purchased, and whether they advise such offer or proposition to be accepted or rejected, and their reasons therefor. R.S.O. 1887, c. 108, s. 55.

66. Any Court authorized to make partition of real estate may direct a sale of the same if it thinks it right so to do, upon the application of any of the parties beneficially interested therein, giving however the preference at all times to the person who would have been the heir-at-law to such real estate had section 37 and the following sections of this Act not been passed, and after such heir-at-law, then giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R.S.O. 1887, c. 108, s. 56.

67. Every such preference shall be upon and subject to such terms, security and conditions, as the Court thinks it right to direct. R.S.O. 1887, c. 108, s. 57.

THE WILLS ACT.

R.S.O. CHAPTER 128.

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WILLS BEFORE 1ST JANUARY, 1874.

2. In the next succeeding three sections of this Act the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives; or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency. R.S.O. 1887, c. 109, s. 2.

WILLS AFTER 1ST JANUARY, 1874.

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9. In the construction of the sections numbered 10 to 39 inclusive in this Act,

1. "Will" shall extend to a testament, and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of the Act passed in the twelfth year of the reign of King Charles the Second, entitled "*An Act for taking away the Court of Wards, and liveries and tenures in capite, and by knight's service and purveyance, and for settling a revenue upon His Majesty in lieu thereof,*" and to any other testamentary disposition;

2. "Real estate" shall extend to messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein;

3. "Personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein;

4. "Mortgage" shall include any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate. R.S.O. 1887, c. 109, s. 9.

5. "Person" and "Testator" shall include a married woman. 60 V. c. 3, s. 3. See R.S.O. 1877, c. 106, s. 9 (4); R.S.O. 1887, c. 132, s. 3 (1).

10. Every person may devise, bequeath, or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir-at-law, or upon his executor or administrator; and the power hereby given shall extend to estates *pur autre vie*, whether there be or be not any special occupant thereof, and whether the same be corporeal or incorporeal hereditaments; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator be or he not ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. R.S.O. 1887, c. 109, s. 10.

THE TRUSTEE ACT.

R.S.O. CHAPTER 129.

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7. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditaments shall vest in the legal personal representative, from time to time, of such trustee. R.S.O. 1887, c. 110, s. 6.

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9. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose; and such payment to and receipt by the survivors or survivor of two or more mortgagees or holders or the executors or administrators of such survivor or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the trust or security. R.S.O. 1887, c. 110, s. 8. (See also c. 121, s. 14).

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13. The executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living. R.S.O. 1887, c. 110, s. 12.

14. Such arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distresses for rent shall be applicable to the distresses so made as aforesaid. R.S.O. 1887, c. 110, s. 13.

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16. Where by any will coming into operation after the eighteenth day of September, 1865, or after the passing of this Act, a testator charges his real estate, or any specific portion thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such estate, the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said real estate or any part thereof, or by a mortgage of the same, or partly

in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same think proper. R.S.O. 1887, c. 110, s. 18.

17. The powers conferred by the next preceding section shall extend to all and every the person or persons in whom the estate devised is for the time being vested by survivorship, descent or devise, or to any person or persons appointed under any power in the will or by the High Court to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid. R.S.O. 1887, c. 110, s. 19.

18. If a testator who creates such a charge as is described in section 16 does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee or trustees, the executor or executors for the time being named in the the will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore conferred upon the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship is for the time being vested; but any sale or mortgage under this Act shall operate only on the estate and interest of the testator. R.S.O. 1887, c. 110, s. 20.

19. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the preceding three sections of this Act, or any of them, have been duly and correctly exercised by the person or persons acting in virtue thereof. R.S.O. 1887, c. 110, s. 21.

20. The provisions contained in the preceding four sections shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the 18th day of September, 1865; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the said sections had not been enacted; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do. R.S.O. 1887, c. 110, s. 22.

21. Where there is in any will or codicil of any deceased person, whether such will has been made, or such person has died before or after the 1st day of January, 1874, any direction whether express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any real estate, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute and carry the same into effect, the executor or executors (if any) named in such will or

codicil shall and may execute and carry into effect every such direction to sell, dispose of, appoint, encumber or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if the executor or executors of the testator were appointed by the testator to execute and carry the same into effect. R.S.O. 1887, c. 110, s. 23.

22. Where there is in any will or codicil thereto of any deceased person, whether such will has been made, or such person has died before or after the first day of January, 1874, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, incumber, or lease any real estate or any estate or interest therein, whether such power is express, or arises by implication, and where, from any cause, letters of administration with such will annexed have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given the additional security required by section 58 of *The Surrogate Courts Act*, such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber, or lease such real estate, and any estate or interest therein in as full, large, and ample a manner, and with the same legal effect for all purposes, as the said executor or executors might have done. R.S.O. 1887, c. 110, s. 24.

23. Where there is in any will or codicil thereto of any deceased person (whether such will has been made or such person has died before or after the first day of January, 1874), any power to sell, dispose of, appoint, mortgage, incumber, or lease any real estate, or any estate or interest therein, whether such power is express, or arises by implication, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute such power, and letters of administration with such will annexed have been by a Court of competent jurisdiction in Ontario, committed to any person, and such person has given the additional security before mentioned such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if such last named person had been appointed by the testator to execute such power. R.S.O. 1887, c. 110, s. 25.

24. Where any person has entered into a contract in writing for the sale and conveyance of real estate, or of any estate or interest therein, and such person has died intestate, or without providing by will for the conveyance of such real estate, or estate or interest therein, to the person entitled or to become entitled to such conveyance under such contract, then, if the deceased would be liable to execute a conveyance, were he alive, the executor, administrator, or administrator with the will annexed (as the case may be), of such

deceased person, shall make and give to the person entitled to the same a good and sufficient conveyance or conveyances of such estates, and of such nature as the said deceased, if living, would be liable to give, but without covenants, except as against the acts of the grantor; and such conveyances shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity. R.S.O. 1887, c. 110, s. 26.

25. Every executor, administrator, and administrator with the will annexed, shall, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, be subject to all the liabilities, and compellable to discharge all the duties of whatsoever kind, which, as respects the acts to be done by him under such powers, would have been imposed upon an executor or other person appointed by the testator to execute the same, or in case of there being no such executor or person, would have been imposed by law upon any person appointed by law, or by any Court or Judge of competent jurisdiction to execute such powers. R.S.O. 1887, c. 110, s. 27.

26. Where there are several executors, administrators, or administrators with the will annexed, and one or more of them die, the powers hereby created shall vest in the survivor or survivors. R.S.O. 1887, c. 110, s. 28.

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34. On the administration of the estate of a deceased person, in case of a deficiency of assets debts due to the Crown and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another: but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate. R.S.O. 1887, c. 110, s. 52.

35. In case the executor or administrator gives notice in writing referring to this section and of his intention to avail himself thereof to any creditor or other person of whose claims against the estate he has notice, or to the attorney or agent of such creditor or other person, that he the executor or administrator rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within six months after the notice is given, in case the debt or some part thereof is due at the time of the notice, or within six months from the time the debt or some part thereof falls due if no part thereof is due at the time of the notice, and in

default the claim shall be forever barred; Provided always that in case the claimant shall be nonsuited at the trial the claimant, or his executors or administrators, may commence a new action within a further period of one month from the time of the nonsuit. R.S.O. 1887, c. 110, s. 33.

THE MARRIED WOMEN'S PROPERTY ACT.

R.S.O. CHAPTER 163.

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23. For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have or be if she were living. R.S.O. 1887, c. 132, s. 22.

THE STATUTE OF DISTRIBUTION.

R.S.O. CHAPTER 335.

1. This Act may be cited as "The Statute of Distribution." New.

2. Subject to the provisions of *The Devolution of Estates Act*, the surplusage of the personal estate of any person dying intestate shall be distributed in manner and form following, that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead, other than such child as shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion equal to the share which shall by such distribution be allotted to the other children, to whom such distribution is to be made. And in case any child shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life time by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then, so much of the surplusage of the estate of such intestate shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated. And in case there be no children, nor any legal representatives of them, then, one moiety of the said estate shall be allotted to the wife of the intestate, and the residue of the said estate shall be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them. 22 & 23 Car. 2, c. 10, s. 3, (or ss. 5 and 6, in Ruffhead's Ed.).

3. Provided that there be no representations admitted among collaterals after brothers' and sisters' children, and in case there be no wife, then, all the said estate shall be distributed equally to and amongst the children, and in case there be no child, then, to the next of kindred in equal degree of, or unto, the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever. 22 & 23 Car. 2 c. 10, s. 4, (or s. 7 in Ruffhead's Ed.).

4. To the end that a due regard be had to creditors, subject to the provisions of section 38 of *The Trustee Act*, no such distribution of the goods of any person dying intestate shall be made till after one year be fully expired after the intestate's death, and every one to whom any distribution and share shall be allotted shall give bond with sufficient sureties, that if any debt truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he shall refund and pay back to the administrator his rateable part of that debt, and of the

costs of suit and charges of the administrator by reason of such debt out of the part and share so as aforesaid allotted to him, thereby to enable the said administrator to pay and satisfy the said debt, so discovered after the distribution made as aforesaid. 22 & 23 Car. 2, c. 10, s. 5, (or s. 8 in Ruffhead's Ed.).

5. If after the death of a father any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, anything in section 2 of this Act to the contrary notwithstanding. 1 Jac. 2, c. 17, s. 7.

AN ACT RESPECTING EXECUTORS AND ADMINISTRATORS.

R.S.O. CHAPTER 337.

12. Subject to the provisions of *The Devolution of Estates Act*, where a testator by his will doth devise and direct lands to be sold by his executors, such sale may be validly made by such one or more of the executors as shall take upon him, or them, the care and charge of the said will, and a conveyance by such executor or executors shall be as valid and effectual in law as if all of the executors named in the will had joined therein. 21 Hen. 8, c. 4, s. 1.

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14. When any person shall die having by will or codicil, appointed any person to be executor, such executor shall be deemed to be a trustee for the person (if any) who would be entitled to the estate under *The Statute of Distribution*, in respect of any residue not expressly disposed of, unless it shall appear by the will, or codicil, that the person so appointed executor was intended to take such residue beneficially. Imp. Act, 11 Geo. 4 & 1 W. 4, c. 40, s. 1.

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20. Property, real and personal, over which a deceased person has a general power of appointment which he may exercise for his own benefit without the assent of any other person, shall be assets for the payment of his debts, where the same is appointed by his will; and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold, after the deceased person's own property has been exhausted. (See 3 W. & M. c. 14); 2 Ed. 7, c. 1, s. 6.

THE STATUTE LAW REVISION ACT, 1902.

2 EDW. VII. CHAPTER 1.

Whereas the various enactments mentioned in the Schedule to this Act are spent or have ceased to have force, otherwise than by express and specific repeal, or have by lapse of time and change of circumstances become unnecessary, or the subject matter thereof is sufficiently provided for by other enactments, or for other reasons it is desirable that the same should be repealed;

Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as *The Statute Law Revision Act*, 1902.

2. The enactments described in the schedule to this Act are hereby repealed, but as regards the Imperial statutes if, and, so far only as, the same are in force, and within the legislative authority, of this Province.

3. Clause (a) of section 3, of *The Devolution of Estates Act* (R.S.O. c. 127) is repealed and the following substituted therefor:

(a) To all estates of inheritance in fee simple, and all estates held by the deceased for the life of another, in any tenements or hereditaments in Ontario whether corporeal or incorporeal.

4. The lands of a deceased person which shall become vested in his heir or devisee under the thirteenth section of *The Devolution of Estates Act* shall continue to be liable to answer the debts of such deceased person as they would be if vested in the personal representative of the deceased, and in the event of a *bona fide* sale thereof for value, by such heir, or devisee he shall be personally liable for the debts due to the creditors of such deceased person to the extent of the proceeds of such lands, and in case the sale shall not have been *bona fide*, then to the extent of the actual value of the said lands.

5. Any *bona fide* purchaser for value of any lands of any deceased person which have become vested in his heir, or devisee as aforesaid, without notice of the claims of any unpaid creditors of the deceased person, through whom such heir, or devisee, shall claim, shall be entitled to hold such lands freed and discharged from the claims of such creditors.

6. Property, real and personal, over which a deceased person has a general power of appointment, which he may exercise for his own benefit without the assent of any other person, shall be assets for the payment of his debts, where the same is appointed by his will; and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold, after the deceased person's own property has been exhausted.

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SCHEDULE.

This schedule, so far as it relates to the Imperial statutes, is to be read as referring to the Revised Edition of the Statutes prepared under the direction of the Imperial statute law committee of the United Kingdom, as to the statutes included in that edition. The chapters of the statutes (before the division into separate Acts) are described by the marginal abstracts given in that edition.

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3 W. & M. c. 14.—(Property appointed made assets for payment of debts). (Substitute for this. See section 6 of this Act).

AN ACT TO AMEND THE DEVOLUTION OF ESTATES ACT.

2 Edw. VII. Chapter 17.

1. Nothing in section 13 of *The Devolution of Estates Act* shall be held to derogate from any right possessed by an executor or administrator with the will annexed under a will or under *The Trustee Act* or from any right possessed by a trustee under a will.

2. The preceding section shall operate as if the same had been enacted on the 4th of May, 1894, except that nothing therein contained shall affect the construction of the said section in its respects any conveyance heretofore made by any devisee or heir but so far as it affects any such conveyance the said section 13 shall be construed as if the preceding section had not been enacted.

3. The said section 13 is amended by substituting the words "three years" for the words "twelve months" occurring in the third line of the said section, but such amendment shall only apply to the real estate of persons who have died within one year before the passing of this Act, or shall hereafter die.

4. Section 14 of the said *Devolution of Estates Act* shall extend to cases where a grant of probate of the will or of administration to the estate of the deceased may not have been made within twelve months or any longer period after the death of the testator or intestate. This section shall be deemed to have been in force on and from the 27th day of May, 1893.

5. The powers of an administrator and of an executor under the said Act are hereby declared to include the power of leasing lands and of mortgaging lands for the purpose of paying debts, but no lease hereafter made under such power shall, where an infant is interested, extend beyond the coming of age of the said infant or where more infants than one are interested shall extend beyond the coming of age of the eldest of said infants. The written consent or approval of the official guardian to a lease or mortgage under the said power shall be required under the like circumstances as it would be required if the land were being sold.

6. Sales of realty made and leases and mortgages granted by executors and administrators with the written consent or approval of the Official Guardian prior to the passing of this Act, whether the probate of the will of the testator or letters of administration to the estate of the intestate have been taken out before or after the expiration of a year after the death of the testator or intestate, shall be valid as respects all the heirs or devisees, whether infants or of full age, for or on behalf of whom the consent of the Official Guardian has

been obtained, and sales of land by executors and administrators in other cases made prior to the passing of this Act shall be adjudicated upon in like manner as is provided in sub-section 3 of section 17 of *The Devolution of Estates Act* and shall be valid unless questioned in an action within one year from the passing of this Act except in any case where under *The Devolution of Estates Act* the approval of the Official Guardian was required and was not obtained.

7. Where prior to the passing of this Act there has been a sale by executors or administrators, no infant being concerned and no consent or approval of the Official Guardian having been obtained, but the person or one of the persons beneficially entitled has received and accepted, or shall hereafter receive and accept, his share or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person.

8. Sub-section 1 of section 16 of the said *Devolution of Estates Act* is amended by adding the following clause thereto:

(a) The said executors and administrators shall also have power with the concurrence of the persons beneficially entitled thereto, or with the approval of the Official Guardian where there are infants, lunatics, or non-concurring persons beneficially entitled, to divide the estate of the deceased or any portion or portions thereof amongst the persons entitled thereto.

9. Section 9 of the said Act is amended by striking out the word "hereinbefore" where that word occurs in the first line of the said section and substituting therefor the word "herein."

10. Section 14 of the said Act is amended by striking out the words "twelve months" where they first occur in the said section and substituting therefor the words "the proper time," and by striking out the words "twelve months," where they occur the second time in the said section and substituting therefor the word "periods."

11. Section 15 of the said Act is amended by striking out the words "twelve months" where they first occur in the said section and substituting therefor the words "the proper time," and by striking out the words "after the expiration of twelve months from the death of the testator or intestate" and substituting therefor the words "after the time within which the executors and administrators might without any consent, order or certificate have registered a caution."

12. (1) Real estate of persons who have died on or after the first day of July, 1886, and before the fourth day of May, 1891, which has not already been disposed of or conveyed by the executors or administrators of such persons, shall at the expiration of one year from the passing of this Act be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto (or their assigns as the case may be) without any conveyance by the executors or administrators unless within the said year such executors or administrators

shall have caused to be registered a caution as authorized in respect of the real estate of persons dying after the said fourth day of May, 1891, by the Act passed in the fifty-fourth year of Her late Majesty's reign intituled *An Act respecting the sale of Real Estate by Executors and Administrators.*

(2) In case of such caution being so registered this section shall not apply to the real estate referred to therein for twelve months from the time of such registration or from the time of the registration of the last of such cautions, if more than one are registered.

(3) This section shall be applicable notwithstanding a grant of probate of the will of the deceased or of administration to his estate may not have been made prior to the expiration of the said period.

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